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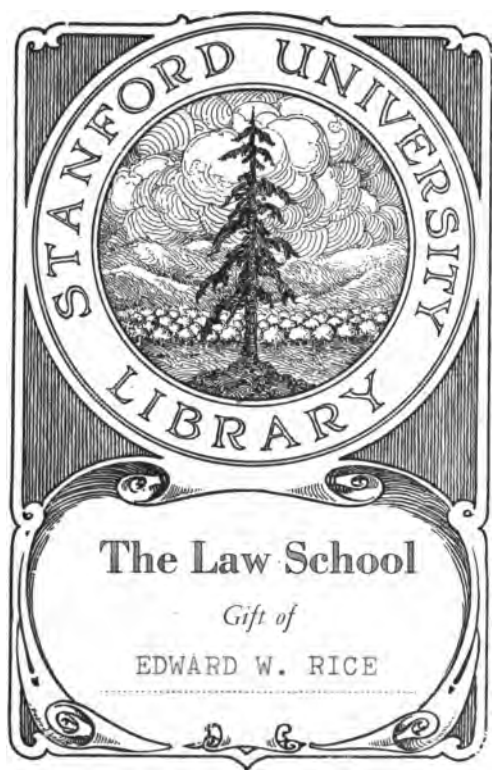
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THE  
RIGHTS AND LIABILITIES  
OF  
HUSBAND AND WIFE,  
At Law and in Equity;

AS AFFECTED BY MODERN STATUTES AND DECISIONS.

BY  
JOHN FRASER MACQUEEN, ESQ.,  
OF LINCOLN'S INN, BARRISTER-AT-LAW; AUTHOR OF "THE PRACTICE OF THE HOUSE OF  
LORDS AND PRIVY COUNCIL."

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PART I.

CONTAINING CASES NOT AFFECTED BY SETTLEMENT, AND THE PRACTICE  
UPON ACKNOWLEDGMENTS BY MARRIED WOMEN.

LONDON:  
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TO  
THE RIGHT HONOURABLE  
JOHN, LORD CAMPBELL,  
&c. &c. &c.

---

MY LORD,

It is not your eminence as a great lawyer, nor your distinction as a leading member of our highest Legislative Assembly, that moves me to dedicate the following Treatise to your Lordship :—I inscribe it to the Author of the “Lives of the Chancellors.”

I have the honor to be,

MY LORD,

Your Lordship's very faithful and obliged Servant,

JOHN FRASER MACQUEEN.

**CORRIGENDA.**

---

Page 47, the case mentioned as decided by Lord Keeper North was *Palmer v. Trevor*, 1 Vern. 261.

Page 162, omit the word "matured" in the third line from the top.

## TO THE READER.

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My object is practically to delineate the incidents of marriage, so far as cognizable by the temporal Courts. I do not touch on questions of Ecclesiastical jurisdiction.

What is now submitted to the profession embraces the rights and liabilities to which the contract gives rise under the general law of the land, unaffected by local custom or special stipulation. This naturally forms the first division of the subject. It is introductory to the rest, but nevertheless stands on its own ground ; being at once entire, distinct, and independent.

The present volume, therefore, ought to be found complete in itself.

The remainder of the Treatise is deferred in expectation of an important judgment from the House of Lords upon deeds of separation.

My purpose is to give the work throughout a modern character. I do not, therefore, discuss any topics of obsolete erudition ; which, though curious, are of little, or no practical utility. The rules, moreover, which govern the rights of property and pecuniary liabilities of

married persons, have been more altered and matured in the last quarter of a century than any other branch of the law.

Questions of Conveyancing I endeavour to avoid; because these form the subject of works which are necessarily in every hand.

For a similar reason, I am silent, or nearly so, as to pleading.

But even, keeping within the limits of a strict adherence to the subject, there is still enough to do; for the relation of husband and wife has been singularly fertile in the production of legal difficulties and judicial conflict; and I do not always think myself at liberty to give decisions without commentary.

Small, however, as my performance at present may appear, it will seem less when I mention the assistance I have received. And, first, let me express my deep acknowledgments to Mr. Russell, Q. C., who did me the great favour of revising these sheets as they passed through the press; the leisure of the long vacation having enabled him to perform this act of friendship.

I am likewise indebted to Mr. Lee, Q. C., for many very valuable suggestions.

To Mr. W. D. Evans, of the Equity Bar, my cordial thanks are due; more especially for his aid in examining with me the difficult case of Sir Edward Turner;\*

\* *Infra*, p. 89.

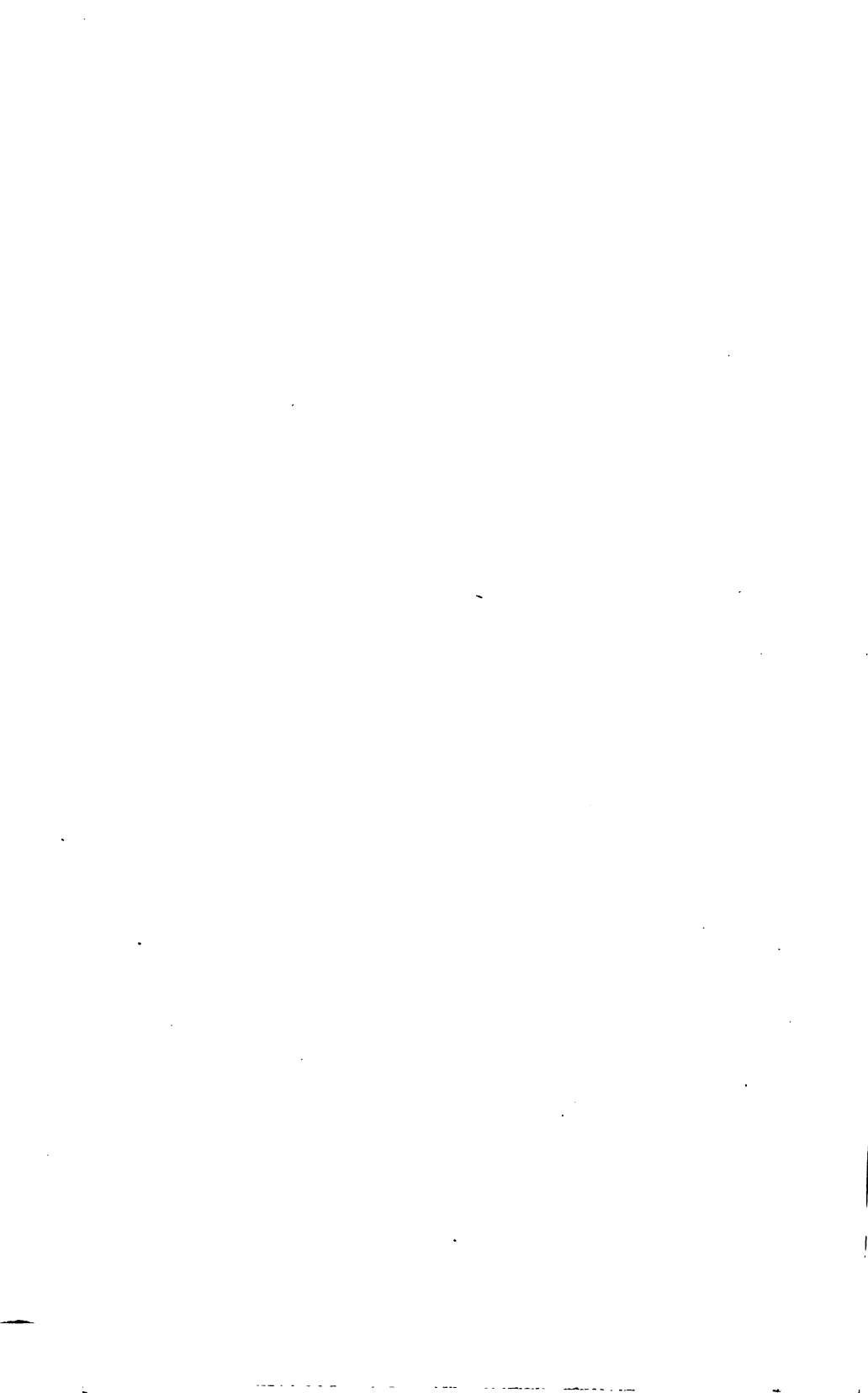
which, after a century and a half, continues still to divide the opinions of lawyers.

In the Appendix, No. I., there is a practical Summary of proceedings on "Alienations by Married Women," which, I hope, will prove useful, (particularly to solicitors), not only in England, but in Scotland and Ireland, as well as abroad; wherever, in short, married women having English deeds to execute, may happen to reside. It is the first effort yet made to methodise and elucidate the system established under the Fines and Recoveries Act, and the rules of the Court of Common Pleas, passed in pursuance thereof. To say nothing of the pains bestowed on it by myself, this Summary has had the benefit of a careful revision by Mr. Millard, of the Acknowledgments Office, who has contributed the forms and other materials now, for the first time, made public. Those who know from experience the many misapprehensions which the new enactments occasion,\* will be the readiest to commend the good service done by Mr. Millard, to whom I have pleasure in expressing my obligation.

J. F. M.

9, OLD SQUARE, LINCOLN'S INN,  
October 28, 1847.

\* The number of Acknowledgments taken in each year is no less than 6,000. This shows the importance of having the practice rightly understood.





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## INTRODUCTORY REMARKS.

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### HISTORY OF THE MARRIAGE CONTRACT.

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<p>1. <i>Marriage a Contract at once Civil and Divine</i> . . . 1</p> <p>2. <i>Completed on the Continent prior to the Trent Decree, by mere consent</i> . . . 2</p> <p>3. <i>Legitimation per subsequens Matrimonium</i> . . . 3</p> <p>4. <i>Trent Decree, requiring ecclesiastical celebration</i> . . . 3</p> <p>5. <i>Ancient Marriage Law of England</i> . . . 4</p> <p>6. <i>Trent Decree not received in England</i> . . . 4</p> <p>7. <i>Marriage in England by mere consent defective, except for certain purposes</i> . . . 4</p> <p>8. <i>Effects of English Marriages by mere consent</i> . . . 5</p> <p>9. <i>Ancient Marriage Law of England very peculiar</i> . . . 6</p>	<p>10. <i>Priests' Intervention always indispensable to perfect marriages in England</i> . . . 6</p> <p>11. <i>Evils of Clandestine Marriages</i> . . . 7</p> <p>12. <i>Remedy by Lord Hardwicke's Act</i> . . . 7</p> <p>13. <i>Requisites under that Act</i> . . . 8</p> <p>14. <i>Its operation in England similar to that of the Trent Decree on the Continent</i> . . . 9</p> <p>15. <i>It often worked injustice. Hence, 4 Geo. 4, c. 76</i> . . . 9</p> <p>16. <i>Present Law, 6 &amp; 7 Will. 4, c. 85</i> . . . 10</p> <p>17. <i>Who may Marry</i> . . . 11</p> <p>18. <i>Distinction between Banns and Licenses</i> . . . 12</p>
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THE Contract of Marriage, by which man and woman are conjoined in the strictest society of life till death or divorce shall separate them, is the most ancient, the most important, and the most interesting of the domestic relations. Though correctly designated a civil contract, it differs in sundry points from all other civil contracts; and chiefly in this, that it is indissoluble at the volition of the parties. For which reason, and because of certain mysterious expressions of high import respecting it in the sacred

Marriage a contract at once civil and divine.

writings, it is also deemed a *divine* contract; having been so constituted by the circumstances of its original institution in the case of our first parents, and by the fact of its subsequent elevation into the character of a symbol, or type, emblematical of the union of Christ with his Church. Hence, by Roman Catholics, marriage is considered a sacrament; and even by many denominations of Protestants it is regarded as in some degree partaking of the sacramental nature, although they do not admit it to be actually a sacrament. And this it is which renders matrimony an holy estate, religious in its chief essential attributes, though temporal and arbitrary in its multiform methods of external celebration.

Anciently completed throughout the continent by the mere consent of parties.

By the earlier ecclesiastical law, down to the middle of the 16th century, marriage throughout the continent of Europe was looked upon as a *consensual* contract (*a*), capable of being completed by the parties without any interposition of spiritual authority. This appears from the Decretals, from Sanctius *De Matrimonii*, and more especially from De Burgh, who (in a Treatise, composed at the end of the 14th century) expressly affirms that the priests' co-operation is unnecessary, as not being of the essence of the matrimonial sacrament, but merely recommended by the Church for the sake of greater decency and order. So that according to these venerable testimonies the sacrament of marriage might be mutually administered by the contracting parties to each other, without the aid of the sacerdotal office; or even the presence of any one clothed in holy orders.

(*a*) That is to say, a contract completed by a mere interchange of consent—by the *conjunctio animorum*; so that although the parties, after consent given, should, by death, disagreement, or other cause what-

ever, happen not to consummate the marriage *conjunctio corporum*, they were, nevertheless, entitled to all the rights, and subject to all the liabilities of the marriage state.

And here may shortly be mentioned a benevolent fiction of the Roman law, whereby children born bastards were held legitimate on the subsequent marriage of their parents—a rule which was adopted by the Canonists, and followed by every Christian nation, whether Popish or Protestant, England alone excepted. And yet there were not wanting strenuous efforts to import this doctrine hither. But it met with a memorable and final repulse from the Barons, assembled in Parliament, at Merton, who, in answer to a proposition for its introduction, emphatically declared *nolumus leges Angliæ mutari* (b).

Legitimation  
subsequente  
matrimonio.

Thus, then, stood the general law of marriage, when, about three centuries ago, the famous Council of Trent, assembled by the Pope, made a decree, which, after admitting that clandestine marriages had previously been valid, proceeded to declare that, for the future, no marriage should be effectual unless celebrated duly in *facie ecclesiæ* (c). And this, I believe, continues still to be the law of most Roman Catholic communities (d).

Trent decree  
requiring ecclesi-  
astical celebra-  
tion.

(b) It was supposed that although the doctrine of Legitimation per subsequens Matrimonium was not received in England, yet if a person born a bastard in a country where the doctrine obtained, was legitimated by the subsequent marriage of his parents, such person might inherit land in England on the principle that if one be legitimate where he is born, he should be taken to be legitimate all the world over. But in *Birtchistle v. Vardell*, 7 Cl. & Fin. 895, it was decided by the House of Lords that a Scotchman, under such circumstances, although to all intents and purposes legitimate on the north side of the Tweed, and indeed everywhere besides, was, nevertheless, not

legitimate to the effect of inheriting a landed estate of his father's in Yorkshire!

(c) "The law of the Council of Trent is, that a marriage, to be valid, must be in the presence of the parish priest and two witnesses."—*Evidence of Dr. Wiseman in the Sussex Peerage Case*, 11 Cl. & Fin. 764.

(d) But supposing a marriage of two Protestants, celebrated in a Roman Catholic country, according to their own ritual, it would be considered valid, although not in accordance with the *lex loci*.—*Evidence of Dr. Wiseman in the Sussex Peerage Case*, 11 Cl. & Fin. 764.

Ancient marriage  
law of England.

Trent decree  
not received in  
England ;

where, however,  
marriages by mere  
consent were only  
effectual for cer-  
tain purposes.

Upon the late case of the Irish or Presbyterian marriages (e), the great question of debate in the House of Lords was, whether the ancient matrimonial law of England was the same as that which had obtained in the rest of Europe anterior to the decree of the Council of Trent. That decree, be it observed, had authority only in those countries which acknowledged the Papal supremacy. It had no reception in England, being dated nearly thirty years subsequent to the breach between Henry VIII. and the Pope. The matrimonial law of England, therefore, continued on its former footing. By that law clandestine marriages were allowed. But they were not attended with the same effects as marriages solemnised in facie ecclesiæ. And herein lies the peculiarity of the old English law, when viewed in contradistinction to the ancient continental law. By the continental law, prior to the Council of Trent, a private marriage was as good as a public one. By the law of England, until altered by the statutes to which we are about to advert, a private marriage, that is to say, a marriage not solemnised in facie ecclesiæ, was good only for certain purposes (f). Thus, a private or clandestine marriage, or, as it was sometimes called, a verbal contract, (which might either be by words of present consent, or by words of promise, followed by cohabitation), was, in the first place, not sufficient to give the woman the right of a widow in respect to dower; nor, secondly, to give the man the right of a husband in respect of the woman's property; nor, thirdly, to render the issue begotten legitimate; nor, fourthly, to impose upon the woman the disabilities of coverture; nor, fifthly and lastly, to make the marriage of either of the parties, (living the other,)

(e) *The Queen v. Millis*, 10 Cl. & Fin. 534. *Catherwood v. Caslon*, 13 Mee. & Wel. 261.

(f) Bla. Com. c. 15, p. 439.



with a third person void (*g*); all these consequences being confined exclusively to marriages solemnised in *facie ecclesiæ*.

Nevertheless, the effects of clandestine marriages were very remarkable, though falling greatly short of those which attached upon regular matrimony. For it is now agreed, and has indeed been decided by the House of Lords, that at common law, a contract entered into between man and woman by words of present consent was indissoluble. The parties could not release each other from the obligation. Either party, too, might by a suit in the spiritual court compel the other to solemnise the marriage in *facie ecclesiæ*. It was so much a marriage, that if they cohabited together before solemnisation, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract, moreover, was considered to be of the very essence of matrimony, and was, therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium* and sometimes *ipsum matrimonium*. Another, and a most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnising such marriage in *facie ecclesiæ*, the same might be set aside even after cohabitation and after the birth of children (*h*); and the parties might be compelled to solemnise the first marriage in *facie ecclesiæ*.

What were anciently the effects of private marriages in England.

So a contract of marriage *per verba de futuro* followed by cohabitation, produced precisely the same consequences as a contract *per verba de præsent*i. For where

(*g*) It did make it *voidable*. See the next paragraph in the text.

void. A proceeding to set it aside was necessary.

(*h*) It was not however absolutely

a copula ensued upon the promise, the present consent essential to matrimony was supposed to be at that moment exchanged between the parties; a legal presumption which, though but slightly founded in nature or reality, was held to be abundantly recommended by its equity and the just check which it imposed upon perfidy.

Ancient law of England as to the constitution of marriage very peculiar.

The ancient law of England, therefore, with respect to the constitution of marriage, was very peculiar, and no more to be understood by reference to the continental system, or even to the practice of the sister country of Scotland, than the law of real property or any other branch of our jurisprudence. And this I take to have been the great point established in the case of the Irish marriages above referred to; which, though carried in the House of Lords with infinite difficulty, and in spite of many strong and, as some may think, insuperable arguments opposed to it, must henceforth be regarded as settled and concluded in all legal reasoning on the subject; the short general proposition derivable from the adjudication being, that by the ancient law of England a marriage by private contract was good only for certain purposes, and those not the most important ones; no marriage being absolutely perfect until celebrated in facie ecclesiæ by the intervention of a person in holy orders; that is to say, orders conferred by episcopal authority (i).

Priest always indispensable to perfect marriages.

(i) The theory of Sir Wm. Scott's celebrated judgment in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Rep. 54, does not, it must be owned, correspond throughout with the views above suggested. But it is to be remembered that the Irish Marriage case (*Queen v. Millis*, 10 Cl. &

Fin. 534) underwent the most extensive and elaborate examination; and the decision is by the last resort assisted by the learned judges; so that it is vain and idle to talk of a comparison of opinions. See also *Catherwood v. Caston*, 13 Mee & Wel. 261, decided by the Court

Towards the middle of the last century, the "evil of clandestine marriages was felt to be one of the growing evils of the times, productive of many calamities in families, and of great mischief and disorder in the community" (*k*). Hence, in the year 1753, a statute (the 26 Geo. 2, c. 33) (*l*) was passed at the instigation of Lord Chancellor Hardwicke, intituled "An Act for the better preventing of Clandestine Marriages;" which Act is considered by Blackstone to be "an innovation upon our ancient laws and constitution" (*m*), a sentence which there is but little doubt it deserves. For, adverting to "the great mischiefs and inconveniences" which have

Evils of clandestine marriages.

Remedy thereof by Lord Hardwicke's Marriage Act, 26 Geo. 2, c. 33.

of Exchequer, following the House of Lords. Sir Wm. Scott, too, will be found, on a reperusal, to betray symptoms of hesitation and uncertainty when dealing with the ancient common law of marriage in this country.

(*k*) Per Lord Hardwicke, *Middleton v. Crofts*, 2 Atk. 675.

(*l*) 26 Geo. 2, c. 33. It is said, that at the time when this Act was introduced, the attention of the legislature had been particularly drawn to the subject, by a case which came before the House of Lords in its judicial capacity. The case seems to have been that of *Cochran v. Campbell*, an appeal from Scotland, noticed in the opinions given in *Dalrymple v. Dalrymple*, 2 Hagg. 105, 125. That case was decided by the House of Lords on the 31st of January, 1753, and on the same day it was ordered that the judges should prepare a bill for the better preventing clandestine marriages.—*Lords' Journals*, vol. 28, p. 14. But, although the

example which this case furnished of the effects of the Scotch law of marriage was probably the immediate occasion of the measure, it was confined to England. Some alteration in the law of Scotland was however contemplated at the time : after the bill had been committed, it was ordered that the Lords of Session in Scotland should prepare a bill for the more effectually preventing clandestine marriages in that part of the kingdom.—*Lords' Journals*, vol. 28, p. 98. See 2 Roper, on Husband and Wife, 445. It is very remarkable that the incongruity of the English and Scotch laws of marriage should now for nearly a century have been thought deserving of legislative interposition. That in all that time nothing should have been *done*, though often promised and undertaken, is but another wonder of this age, so fertile in projects adopted and abandoned.

(*m*) 1 Com. c. 15, p. 438.

arisen from verbal contracts, the statute enacted that "in no case whatever should any suit or proceeding be had in any ecclesiastical court, to compel a celebration of any marriage in facie ecclesiæ by reason of any contract of matrimony whatsoever, whether per verba de presenti or per verba de futuro." From this date, therefore, verbal contracts were no longer, as before, indissoluble. Solemnisation could not be enforced; and a subsequent marriage solemnised in facie ecclesiæ could not be avoided; but, on the contrary, would be valid and binding from the time of its celebration, and would be accompanied by all the civil consequences of a regular and perfect marriage.

Requisites under  
Lord Hardwicke's  
Act.

The statute rendered it indispensable that all marriages should be celebrated in some parish church or public chapel. Liberty, however, was given to evade this obligation, by obtaining a special license from the Archbishop of Canterbury; a dispensation too expensive to be frequently resorted to. The marriage must also have been preceded by publication of banns; but these might be got rid of by license from the spiritual Judge. The statute further enacted that all marriages should be solemnised in the presence of two or more witnesses, besides the officiating minister; and an entry of the proceeding was to be made in a register appointed for the purpose, to be signed by the parties, the minister, and the witnesses. Many other formalities were prescribed by the Act; which moreover provided that where either of the parties, (not being a widow or widower,) was under twenty-one, all marriages celebrated by license without consent of guardians should be absolutely void (n).

(n) "Lord Hardwicke's Marriage Act, with considerable modifications and improvements, remains in force, and regulates in England the most important of all contracts upon which civil society itself depends."—*Lord*

The effect of Lord Hardwicke's statute was to do away entirely with clandestine marriages in England; and, so far, its operation here was very much the same as that of the Trent decree upon the continent.

Its operation in England similar to that of the Trent decree on the continent.

The provisions of this enactment (in many instances productive of great hardship and injustice) continued to be law till the year 1823, when, by the 4th Geo. 4, c. 76, the penalty of nullity was confined to the case of persons *wilfully consenting* to the performance of marriage, before publication of banns, or before obtaining a license, or by one not in holy orders, or elsewhere than in a church or licensed chapel. The want of consent, too, by guardians, in the case of minors, did not, by this Act

But it often worked injustice. Hence the 4 Geo. 4, c. 76.

*Campbell's Lives of the Chancellors*, vol. 5, p. 124. The noble biographer states, that before the Act, "young heirs and heiresses, scarcely grown out of infancy, had been inveigled into mercenary and disgraceful matches; and persons living together as husband and wife for many years, and become the parents of a numerous offspring, were pronounced to be in a state of concubinage; their children being bastardised because the father had formerly entangled himself in some promise which amounted to a pre-contract, and rendered his subsequent marriage a nullity. In the public prisons, particularly in the Fleet, there were degraded and profligate parsons ready, for a small fee, to marry all persons at all hours there; and to go, when sent for, to perform the ceremony in taverns or in brothels." After remarking that "the Act declared null all marriages that were not celebrated by a priest in orders," and that "in the case of minors the

license should be void, without the consent of parents or guardians," his lordship proceeds to point out as its prominent defects that "it required Roman Catholics, Dissenters, and others, to submit to it, or be debarred from matrimony altogether. Another great defect was, that no provision was made by it respecting the marriage out of England of persons domiciled in England, so as to prevent the easy evasion of it by a trip to Gretna Green. The measure was likewise highly objectionable in making no provision for the marriage of illegitimate children, who had no parents recognised by law, and could only have guardians by an application to the Court of Chancery; and in declaring marriages which were irregular by reason of unintentional mistakes in banns or licenses, absolutely void, although the parties might have lived long together as man and wife, with a numerous issue considered legitimate, until the discovery of the irregularity."

of Geo. 4, invalidate the marriage; but the minister officiating in such a case was made liable to banishment. And the 23rd section, to be more particularly adverted to hereafter (*o*), provided that, in the event of any fraud practised to procure the contract, the party guilty thereof should forfeit all property accruing from the marriage (*p*).

The statute of Geo. 4 was certainly an improvement upon that of Geo. 2; but it was far from meeting with universal approbation; for, besides many other objections, it left the power of marrying as it stood before, exclusively in the hands of the Church; a restriction which gave offence to almost every denomination of Dissenters. The consequence was, that in the year 1836 the marriage law of this country underwent a still farther mutation; having been then placed on its present footing by the 6 & 7 Will. 4, c. 85, commonly called Lord John Russell's Act, which enables parties desirous of entering into wedlock to complete their contract without any appeal to spiritual authority. Such persons, therefore, as object to marry in facie ecclesiæ may now repair to the registrar; and, upon giving the notices and procuring the certificates prescribed by the statute, may be married, either before that officer by a verbal declaration; or in the registered places appointed for the purpose, may solemnise their marriage according to any form or ceremony they please; taking care, however, whichever mode they resort to, that

Present law, the  
6 & 7 Will. 4, c. 85.

(*o*) See *infra*, p. 15.

(*p*) But see 3 Geo. 4, c. 75, and 4 Geo. 4, c. 17, and Parliamentary Debates of 1822 and 1823. In the above sketch I abstain from setting out the complicated provisions of these Acts, because they were soon

afterwards superseded, or nearly superseded, by the 4 Geo. 4, c. 76. See 2 Roper on Husband and Wife, 482; and see also, *The King v. Inhabitants of Birmingham*, 8 Barn. & Cress. 35, and 5 Bac. Abr. 288.

two witnesses be present, and that the proceeding be completed with open doors between eight and twelve in the forenoon (q), so as to afford, I presume, some security for order and publicity. Marriages thus completed are, in all respects, as binding and as effectual as if they were celebrated sacerdotally. Nay, they are as sacred and religious. For a perfect marriage, in whatever form contracted, must always be the same in its nature and its consequences. It is divine by divine appointment. It can never, therefore, exist as a merely civil contract. Its solemn character, its mystic attributes, and, above all, its indissolubility, are entirely independent of ecclesiastical observances. But while we say this much on the one hand, it must be owned, on the other, that unreflecting and ignorant persons will be apt to regard with levity an engagement entered into in a manner so little calculated to awaken seriousness. It is in this point of view that the ritual, the ceremonies, and the admonitions of the Church are of incalculable value. For which reason it is a source of congratulation, even to the authors of the late statute themselves, that, except for purposes of registration, much less resort has been had to its machinery than might have been anticipated; the people of this country being, in general, satisfied with the liberty afforded by the Act, although most of them recoil from its exercise.

The law which regulates the constitution of the Marriage Contract being now stated, let us see who are capable of entering into this relation. And first, we may observe that no persons are competent to bind themselves in matrimony until they have attained the age of consent, which, by the common law, (following the Roman,) is

Who may marry  
The parties must  
have attained the  
age of 14 in the  
male, and 12 in  
the female, and  
there must be the  
requisite con-  
sents.

(q) These are the hours prescribed commonly called the canonical hours.  
by the 62nd canon, and hence are See 4 Geo. 4, c. 76, s. 21.

fixed at fourteen in males, and twelve in females; not, as some writers affirm, because the parties are then supposed to have sufficient discretion to appreciate the consequences of so critical and responsible an engagement; but because in general they have by that time arrived at physical maturity, and the worst social evils would ensue from holding them incapable of marrying.

Other requisites.

Not only must the parties be of the proper age, but they must secure the requisite consents; the late Act having in that respect made no change (*r*). They must have competent mental understanding, and competent corporal capacity (*s*). So likewise we may remark, that neither of the parties can enter into the contract if married at the time to another individual; in which case, besides the penalties of bigamy (*t*), it is evident that if the first marriage be legally good, the second must, of necessity, be legally bad. And here I may add that, by Lord Lyndhurst's Act (*u*), marriages between persons within the prohibited Levitical degrees of consanguinity and affinity are now ipso facto void, and not merely voidable.

Distinction between banns and licenses.

(*r*) 6 & 7 Will. 4, c. 85, s. 10. See also Form of License, Schedule C. After due publication of banns no evidence of the consent of the guardians is necessary. But the banns must be correct; otherwise the marriage will be void. There are many hard resolutions to this effect, founded upon reasoning more specious than just. Sir William Scott said, that banns should be in the true name of the parties; "otherwise no one would be put on their guard by the publication." The same strictness is not required in a marriage License; for which Sir

William Scott assigns this reason: that "it is granted by the ordinary on the evidence which he is contented to receive; namely, the oath of the party, as required by the canons of the Church." See *Rex v. Inhabitants of Tibshelf*, 1 Barn & Ad. 190; *Lane v. Goodwin*, 3 Gale & Davidson, 610.

(*s*) We have a late instance in the Ecclesiastical courts of a sentence of nullity by reason of a natural incurable physical malconformation, *D. v. A.* 1 Rob. Rep. 379.

(*t*) 1 James 1, c. 11.

(*u*) 5 & 6 Will. 4, c. 54.



OF FORFEITURES UNDER 4 GEO. 4, c. 76, AND  
6 & 7 WILL. 4, c. 85.

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As preliminary to the investigation upon which we are about to enter, it is proper to intimate here, that the validity or invalidity of the Marriage Contract, involving topics of ecclesiastical jurisdiction, will not be discussed in the following pages; the objects of which are limited to a practical inquiry into the effects of the contract, (assumed to be valid,) upon *Property*. But in certain cases those effects are prevented from arising; and it is proper to state such cases in the outset.

This work limited to the effects of marriage upon property.

In certain cases those effects do not arise.

We have seen that the marriage of persons under age may have unquestionable validity, although entered into without the consent of guardians. Such marriages, however, though not void, are nevertheless forbidden by the law; and it sometimes happens that parties eager to effect matrimony commit a fraud in order to get rid of the effects of this legal interdiction. What, then, are the consents required? The 16th section of the 4 Geo. 4, c. 76, enacts—

Provisions of the 4 Geo. 4, c. 76, s. 16.

That the father of any person under twenty-one, (not being a widower or widow); or if the father shall be dead, the guardian or guardians of the person of the party so under age, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed

Consent of guardians required to marriages of infants.

by the Court of Chancery, if any or one of them shall have authority to give consent to the marriage of such party ; and such consent is hereby required for the marriage of such person so under age, *unless there shall be no person authorised to give such consent.*

Where guardians  
are non compos,  
&c.

By the 17th section it is enacted, "That in case the father or fathers of the parties to be married, or of one of them, shall be non compos mentis, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary to the marriage, shall be non compos mentis, or beyond the seas, or shall unreasonably or from undue motive withhold consent, an application may be made to the Court of Chancery by petition in a summary way ; and if the proposed marriage shall appear proper, a judicial declaration to that effect may be made, which shall be as effectual as if a consent had been duly had from guardians." It has been decided that this clause does not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is non compos mentis (*v*). In *Cook v. Fryer* (*x*), on the proposed marriage of an infant daughter of one who was non compos mentis, a petition was presented to the Lord Chancellor, under this section, for his consent, in order to obtain a license. The petition was referred to the Master, and the intended husband by affidavit stated, that he had agreed to make a certain settlement. The Master reported in favour of the marriage ; and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor ; but shortly afterwards married under the 6 & 7 Will. 4, c. 85, without license. The settlement mentioned in the affidavit was not made ; the parties having entered into articles for a different settlement. It was held by

(*v*) *Exp. J. C.*, 3 Myl. & Cr. 471.

(*x*) 1 Hare, 498.

Vice Chancellor Wigram, that the proposal laid before the Master amounted to a contract which, in the absence of any settlement properly substituted for it, the Court would enforce.

The first inquiry, therefore, in every case must be whether the parties when they intermarried were of lawful age, and, if not of lawful age, whether the requisite consents were obtained; because although the want of such consent will not invalidate the marriage, it will produce a consequence which some may think a greater calamity; for by the 23rd section of the 4 Geo. 4, c. 76, it is enacted—

That, if any marriage by license shall be procured by a party to such marriage, to be solemnised between persons one or both of whom shall be under age (not being a widower or widow), by means of such party falsely swearing; or if any marriage by banns shall be procured by a party thereto to be solemnised between persons one or both of whom shall be under age (not being a widow or widower), such party knowing that such person under age had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this Act, and having knowingly caused or procured the undue publication of banns, then, and in every such case, it shall be lawful for His Majesty's Attorney General, by information in the nature of an English Bill in the Court of Chancery, at the relation of a parent or guardian of the minor, to sue for a forfeiture of all property which hath accrued or shall accrue to the party so offending, by virtue of such marriage: and such Court shall have power to declare such forfeiture, and thereupon to direct that such property shall be secured for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit. And if both the parties so contracting marriage shall in the judgment of the Court be guilty of such offence, it shall be lawful for the Court to settle and secure such property immediately, for the benefit of the issue of the marriage, subject to such provisions for the offending parties as the Court shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue

Forfeitures by reason of fraudulent marriages without consent of guardians.

of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other.

The clause, of which only an abridgment is here given, requires that before any information is filed in pursuance of it, the case be made out to the satisfaction of the Attorney or Solicitor General, upon oath (*y*). It has been decided (*z*), that where a husband incurs a forfeiture under this clause, the Court has no discretion to mitigate the penalty; but is bound to settle and secure all property present and future, of the wife, for the benefit of herself and the issue of the marriage. And that where the husband *alone* incurs a forfeiture, the Court has no authority to order any settlement of the wife's property on her issue by any subsequent marriage (*a*).

Provisions of the  
6 & 7 Will. 4, c.  
85, s. 43.

The like proceedings may be resorted to, and the like consequences will arise, in the case of similar frauds upon Lord John Russell's Act, 6 & 7 Will. 4, c. 85; the 43rd section of which declares, that the operation, in this respect, under it, shall be the same as that which takes place under the 4 Geo. 4, c. 76.

(*y*) By the 24th section of the same Act, "all agreements, settlements, and deeds, entered into or executed upon marriages, in relation to which such informations as aforesaid shall be filed," are made void.

(*z*) *Attorney General v. Mullay*, 4 Rus. 329.

(*a*) *Attorney General v. Mullay*, 7 Beav. 351. In order to sustain an information, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been

obtained. And it is not necessary to show that the minor was entitled at the time of the marriage to any property, either in possession, reversion, remainder, or expectancy, *Attorney General v. Severne*, 1 Coll. 313. A husband charged with procuring his marriage with a minor by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts on an information, *Attorney General v. Lucas*, 2 Hare, 566.

## Part First.

Showing the Operation of General Rules unaffected  
by Special Stipulation.

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### CHAPTER I.

#### RIGHTS ARISING FROM THE MARRIAGE.

##### SECTION I.

##### CHATELS PERSONAL IN POSSESSION ; AND SPECIFIC CHATELS.

CHATELS PER-  
SONAL IN POS-  
SESSION, &c.

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4. Husband's supremacy and wife's subjugation . . . .	18	9. Deposit at her Banker's . . . .	19
5. Her disabilities . . . .	18	10. Her specific chattels in the hands of third parties . . . .	19
6. Chattels personal &c., which were the husband's before		11. Her bills and notes . . . .	20

HAVING shown how marriages may be completed, and having pointed out the Forfeitures of property to which the contracting parties in certain cases are subject, we now proceed to examine the Rights and Liabilities of Husband and Wife, standing upon general rules unaffected by special stipulation, in so far as the same are enforced at Law and in Equity. Now, to comprehend the nature

CHATTELS PERSONAL IN POSSESSION, &C.

Principle that husband and wife are one person in law.

Irreconcilable with coverture.

Coverture more satisfactory than unity.

Wife's disabilities.

The husband's chattels personal in possession continue his own.

The wife's become the husband's.

and extent of those rights and liabilities, we must keep in view (though, perhaps, not literally or implicitly adopt) a principle to be found in Blackstone and all the older writers, namely, that by marriage the husband and wife become *one person in law*; a principle it must be owned not easily reconcilable with another principle which has universal application,—that of *coverture*; whereby the wife is regarded as distinct from her husband, but so entirely under his power and control that she can do nothing of herself, but everything by his licence and authority. Coverture, which explains most of the cases better than unity, involves two ideas: on the one hand, the husband's supremacy (*b*); on the other, the wife's subjugation,—both creating what are called her Disabilities; which, being, as Blackstone tells us, “intended for the wife's benefit,” are gravely cited by him to prove how “great a favorite is the female sex of the Laws of England.”

The natural order of dealing with the subject will lead us to begin with those Rights which spring immediately from the fact of matrimony, without reference to subsequent acts done in the progress of the marriage state. And first, of chattels personal in possession. Those chattels personal in possession, and specific chattels in the hands of third parties, which before the marriage belonged to the husband, continue to belong to him exclusively, after the marriage; the *communio bonorum* being unknown to the marriage law of England.

Those chattels personal in possession, on the other hand, belonging to the wife in her own right of whatever kind or denomination, which she is beneficially possessed of at the date of the contract, or which come to her during

(*b*) Hence, perhaps, it is that in Baron—his rights being in fact truly the old law books he is termed a Baronial.

the coverture, are absolutely bestowed upon the husband by virtue of the marriage (c); so that he may dispose of them in any way he pleases, whether he survive her or not; for he has an immediate and absolute property devolved to him by the marriage, not only potentially but in fact,—which property can never again revest in the wife or her representatives.

CHATTELS PERSONAL IN POSSESSION, &c.

The phrase chattels personal in possession, as here used, includes all moveables of the wife, such as jewels, household goods and the like, and cash in her hands.

Whether it embraces money at her banker's, may perhaps depend on a distinction first taken by Sir William Grant in *Carr v. Carr* (d). He there says that a balance at a banker's is a debt and not a deposit. And in *Hill v. Foley* (e) it was held that a banker, sued by a customer for payment of his balance, might plead the Statute of Limitations (f). Such balance, therefore, is a chose in action (g).

Her balance at a banker's.

But Sir William Grant suggested that if the money were delivered to the banker in a sealed bag, it would then truly be a *depositum*. It would, to use Lord Mansfield's expression, which Sir William Grant adopts, have an *ear-mark*. In other words, it would be a specific chattel, and as such would, I apprehend, vest by the marriage in the husband as his absolute property. For it has been long settled that where the wife's specific chattels or goods are in the hands of a third person, the husband may bring, in his own name alone, *detinue* or *replevin* or *trover* for

Her deposit at a banker's.

Her specific chattels in the hands of third parties become his property.

(c) Co. Litt. 300.

(d) 1 Mer. 543, n.

(e) 1 Phill. 404.

(f) But see *Pott v. Oleg*, 11 Jurist, 289, decided by the Court of Exchequer on the 1st February, 1847, where the Chief Baron throws

great doubt on the position, that cash at a banker's is merely money lent. See also some good remarks on *Hill v. Foley* in the Jurist of the 24th April, 1847.

(g) As to "the wife's choses in action," see *infra*.

**CHATELS PERSONAL IN POSSESSION, &c.**

them; the right of property being established in him exclusively by the marriage (*h*). Therefore, even should he die without recovering such specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship (*i*).

**Her stock:**

Her fund in court may be pledged by him.

Her bills and notes.

The husband may transfer stock standing in the name of his wife (*k*), and he may pledge her fund standing in the name of the Accountant-General to her account. That is to say, he may do so, subject to the wife's equity to a provision, if such equity exist in her favour (*l*).

As to bills of exchange and promissory notes payable to the wife *dum sola*, they have this resemblance to chattels personal in possession, that instantly upon the marriage the husband alone can negotiate and pass them by indorsement, the wife being rendered incapable of so doing by the disabilities of coverture (*m*).

(*h*) Bull. N. P. 50, 53; 1 Roper, Husb. and Wife, 169; Selwyn's N.P. *Powes v. Marshall*, 1 Sid. 172; 1 Vent. 261. 1 Bacon's Abr. 700. Com. Dig., Bar. and Fem., V. The husband also acquires by the marriage a right to reduce into possession the wife's outstanding personal chattels. But the wife's property in these is not divested by the marriage. For on the contrary it remains in her during the coverture, and survives to her after her husband's death, unless he, in his lifetime, have reduced them into possession. The right, therefore, respecting outstanding personal chattels or choses in action, will be treated of under the head of "Rights arising from acts

done in the marriage state," *infra*.

(*i*) Si femme perd biens, et prit baron, et baron mort, l'executor del baron aver ceux biens, quia le property de eux est en lui per le marriage, *nient obstant* le perdre. *Powes v. Marshall*, 1 Sid. 172.

(*k*) 1 Rop. 225; 3 Ves. 619; 9 Ves. 196.

(*l*) *Sansum v. Dover*, 3 Rns. 91. As to the wife's equity to a provision, see *infra*.

(*m*) *Barlow v. Bishop*, 1 East. 432; 1 Rop. 214. As to the husband suing to recover payment of his wife's bills and notes, and the consequence of his omitting to do so, see "Chattels personal (or choses) in action," *infra*.



## SECTION II.

## OF THE RIGHT TO CHATTELS REAL.

CHATTELS REAL.

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THOSE chattels real which, before the marriage, belonged to the husband, continue to belong to him exclusively after the marriage.

The husband's chattels real continue his.

Those chattels real which, before the marriage, belonged to the wife, fall, by virtue of the marriage, so much under the dominion of the husband that, except in one particular, they are placed entirely at his disposal. The truth is, that the husband's right to the wife's chattels real is of a very peculiar nature, and referable to a period when such interests (now often of the greatest value) were of but mean account in the law; the policy of which has been to give the husband nearly the same power over the wife's chattels real as over her chattels personal in possession. Hence he can alienate and dispose of them at pleasure, so the transaction take effect in his lifetime, that is to say, by act inter vivos. But during the marriage, there is this qualification of his right, (and it is the only restraint on

The wife's are at the husband's disposal in all respects, except that he cannot bequeath them as against his surviving wife.

CHATELS REAL.

his otherwise unrestricted dominion)—namely, that he cannot by will bequeath his wife's chattels real to the exclusion of her claim by survivorship—for if she outlive him she will be entitled to them unless the property was changed by an act completed in his lifetime.

But if he is the survivor he has them absolutely.

On the other hand, if the husband be the survivor, his wife's chattels real become *his* absolutely; to be disposed of by him, either by deed or will. For he is considered to have had during the marriage possession of them by a kind of joint tenancy with his wife; so that, upon her pre-deceasing him, he has them by force of his marital right, and not as her representative. It follows therefore that, in order to secure his wife's chattels real, the husband surviving her is not obliged to take out administration to her (n). The alienation by the husband of his wife's chattels real, if completed in his lifetime, may be with or without consideration (o).

The alienation may be with or without consideration.

And since that, which for a valuable consideration is agreed to be done, is considered in equity as actually performed, it would appear that if the husband agree to dispose of his wife's chattel real, as, for example, of her legal term for years, such agreement, or covenant, will be enforced against the surviving wife (p).

His agreement will bind her surviving.

If he assign the wife's legal term, the wife is clearly bound. And if he assign her trust term, she is also bound; upon the principle that equity, to preserve uniformity in titles to estates, follows the law. But in the case of a trust term, the wife may claim her equity to a settlement, as will appear more fully hereafter (q).

Her legal term and her trust term.

(n) 1 Roll. Abr. 345; 2 Black. 435.

*Clark v. Burgh*, 2 Coll. 226, and 6 Ves. 385.

(o) *Mitford v. Mitford*, 9 Ves. 87.

(q) See equity to settlement, *infra*.

(p) *Bates v. Dandy*, 2 Atk. 207. *Stead v. Creagh*, 9 Mod. 43. See also

*Sturgis v. Champneys*, Index of Cases.

If a woman sue out an elegit, and then marries, her husband will be at liberty to assign this interest of his wife as he may think proper; and so also with respect to statutes merchant and statutes staple (*r*).

CHATELS REAL.

Elegits, &amp;c.

The power which the law gives the husband to alienate the whole interest of the wife in her chattels real, necessarily authorises him to dispose of *part* of it. If, therefore, the husband, being possessed of a term for forty years in right of his wife, or jointly with her, demise it for *twenty* years reserving rent, and dies, such demise, or underlease, will be good against her, although she survive him; but the residue of the original term will belong to her, as undisposed of by her husband (*s*).

When only part alienated the residue will survive.

The husband may defeat his wife's survivorship by other acts besides express alienation; thus, if at the time of her marriage she were a lessee for years, and her husband took a lease of the land for both their lives, this would amount to a disposition of the term; because, by the acceptance of the second lease, the term would be considered as surrendered by operation of law (*t*).

Acts of disposition besides express alienation.

The husband's power extends also over his wife's reversionary interests in chattels real. Nay, it extends over those that are dependent on contingencies not transpiring in his lifetime. Thus, in *Donne v. Hart*, it was held that the contingent reversionary interest of the wife in the trusts of a term for years might be sold by her husband; and that the wife, surviving, would be bound by such sale, even although the husband had died before the contingency was determined, or the reversion fell into

(*r*) 1 Rep. 181.

(*s*) *Sym's case*, Cro. Eliz. 33; 1 Rolle Abr. 344, pl. 10; Moore, 395; 6 Ves. 389.

(*t*) Si feme, lessee pur an, prist

Baron qui puis accept un novel leas pur leur vies, ceo est un surrender del primer leas. 2 Rolle Abr. 495, pl. 50.

CHATTELS REAL.

possession (u). In so deciding, Sir John Leach said, "It is clear that the wife's contingent legal interest in a term may be sold by the husband; and there is no difference in Equity between the legal interests in, and the trusts of a term" (x).

Mortgage by the husband of wife's chattels real.

If the husband mortgages the wife's chattel real, and if, by payment of the money *on the day*, the estate of the mortgagee ceases, it would seem that the wife's right by survivorship is not affected (y).

Effect of such mortgage on the equity of redemption.

Such a mortgage may operate on the legal interest but leave the equity of redemption untouched, as in *Pitt v. Pitt* (z), where a feme sole, having mortgaged a leasehold for years, afterwards married. The mortgage was then transferred; the husband joining in the transfer, and covenanting to pay the money. During the coverture the husband, by gradual payments out of his own property, reduced the money due upon the mortgage. By his will he made a disposition of the mortgaged premises, and died in the lifetime of his wife. Upon a bill by the wife, who claimed to be entitled, by survivorship, to redeem the mortgage, the redemption was decreed to her, upon the terms that the husband's estate should stand in the place of the mortgagee for the sums paid by him out of his own property in reduction of the mortgage debt.

Case of *Clarke v. Burgh*.

In a late case before Vice-Chancellor Bruce (a), it was held that the widow was similarly entitled to the equity of redemption; the transaction showing nothing which betokened an intention, on the husband's part, of defeating

(u) 2 Rus. & Myl. 360

(x) See also *Major v. Lansley*, 2 Rus. & Myl. 355. In *Box v. Jackson*, 1 Drur. 84, Lord Chancellor Sugden said, "He was happy that the doctrine of *Purdew v. Jackson* had not (in *Donne v. Hart*, and

*Major and Lansley*) been extended to chattels real."—See *Purdew v. Jackson*, Index of Cases, and *infra*, of Chattels personal outstanding.

(y) 1 Rep. 184.

(z) Turn. and Rus. 180.

(a) *Clarke v. Burgh*, 2 Coll. 221.

that right. It appeared that he had executed mortgages of his wife's chattel leaseholds. This was considered as dealing with the property only to the extent of the legal interest;—the equity of redemption remained unaffected. The following remarks of His Honour put the thing very clearly:—

CHATELS REAL.

“That these alienations became absolute at law no one can doubt, as the money was not paid at the time appointed. They became absolute at law in the husband's lifetime. It is clear, however, that the assignment has never become absolute in Equity. The only intention on the part of the husband was to give the alienees security for the money advanced. It does not appear to me the wife's rights in Equity are more prejudiced than if a mere deposit of the deeds had been made by the husband. The mortgages are mere pledges or charges, and nothing more.”

The marginal note of the Reporter states that the decision in *Clarke v. Burgh* went upon the consideration that the transaction in question did not amount to “a reduction of the chattels into the husband's possession.” It does not appear, however, that the learned judge, in the observations which fell from him, proceeded on any such ground; but simply on the principle that where a husband's mortgage is made by an instrument which discloses no intention of doing more than simply to make a mortgage, the Court will regard the proceeding with an inclination to believe that nothing more was intended than that which was necessary to constitute a sufficient security for the money advanced. Then, as to a husband reducing chattels real of his wife, “into possession,” what does Sir William Grant say, in *Mitford v. Mitford*? (b). After remarking that choses in action not reduced into possession by the husband survive to the

Reporter's marginal note of that case.

(b) 9 Ves. 87.

**CHATELS REAL.** wife (c), that great authority proceeds thus:—"But there are some legal interests which do not admit, or stand in need, of being reduced into possession, being in possession already, and not lying in action; as terms of years and other chattels real" (d).

**Husband's agreement to mortgage.** The husband's agreement to mortgage the wife's chattels real will be enforced against her only to the extent of the money due (e).

**Forfeiture on outlawry or attainder.** If the husband be outlawed or attainted, his wife's chattel real shall be forfeited to the Crown (f), and it is liable to execution for his debts (g).

**Liability to execution for debt.**

## SECTION III.

**REAL ESTATE.****REAL ESTATE.**

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**Husband's real estate continues his own.**

SUCH real estate as belonged to the husband before the marriage continues to belong to him exclusively after the marriage.

(c) See *infra*, of "The wife's chattels personal or choses in action," and *Purdew v. Jackson*, Index of Cases.

(d) See *Box v. Jackson*, 1 Drur. 84, where Lord Chancellor Sugden says the doctrine of *Purdew v. Jack-*

*son* has not been extended to chattels real.

(e) *Bates v. Dandy*, 2 Atk. 207.

(f) *Plowd.* 263; 2 Black. 434.

(g) *Co. Litt.* 351; 2 Black. 434.

Such real estate, on the other hand, as belonged to the wife before the marriage, or may come to her during the marriage, is placed by the marriage under the dominion of the husband; a dominion, however, limited by and commensurate with the coverture. The law says, that by the marriage the husband acquires, and during the marriage enjoys, a freehold interest in his wife's real estate for their joint lives; both being seised together in her right by entireties (*h*); the effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure; and his conveyance will pass the freehold without the wife's co-operation.

**REAL ESTATE.**

His wife's placed under his dominion for the coverture.

So likewise he may of course charge his wife's estate for their joint lives; the charge, however, of whatever kind, ceasing with the marriage.

But the ultimate property, that is to say, the inheritance or fee of the estate, is not in the husband, whose marital right is bounded by the coverture. Where, then, is the ultimate property or inheritance or fee of the wife's estate while the marriage lasts? It remains in the wife herself, subject to the husband's rights, and can be departed with by the joint act only of both the married

But not for the fee.

And previous examination to ascertain that the act on her part is voluntary, of which, however, she cannot dispose without her husband's concurrence.

(*h*) Litt. s. 291; 1 Inst. 187 b; Tit. 18, c. 1, s. 35; *Owen v. Morgan*, 3 Rep. 5; *Robinson v. Cumming*, Forrest, 167, 3rd edit. n. b., where the report of Lord Talbot's observations is corrected on the authority of Mr. Booth, which correction is confirmed by Mr. Butler. In Piggot's Treatise of Com. Rec., p. 72, it is stated that a husband seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, may create an estate of freehold during the coverture, and

thereby make a good tenant to the precipe. Of this learning, Blackstone, in his popular way, gives the practical result in his Commentaries, vol. 2, p. 433, where he holds, that in the wife's real estate the husband enjoys only a title to the rents and profits during the coverture; for the real estate, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him.

REAL ESTATE.

Provisions for  
these purposes of  
the Fines and  
Recoveries Act.

parties; for the wife is by the disabilities of coverture precluded from disposing of it without her husband's concurrence. And, in order to guard her against the consequences of an undue exercise of marital authority, the law will not suffer her to part with her estate till it is previously ascertained that she performs the act voluntarily. This matter now stands upon the provisions of the Statute for the abolition of Fines and Recoveries (i), and of the rules and ordinances made by the court of Common Pleas in pursuance of that enactment (k).

Now by the 77th section of the act, it is provided that after the 31st December, 1833,

It shall be lawful for every married woman in every case, except that of being tenant in tail, for which provision is already made by this act (l), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this act shall not extend to lands held by copy of court

(i) 3 & 4 Will. 4, c. 74.

(k) See Appendix, No. 1, setting out the orders and regulations of the court of Common Pleas, and the decisions thereon.

(l) By the 40th section of the act, it is provided that "if the tenant in tail making the disposition shall be a married woman, the concurrence of

her husband shall be necessary to give effect to the same, and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed." See the other provisions of the act applicable to dispositions by tenants in tail.



roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor, of which the lands may be parcel (*m*).

REAL ESTATE.

The 78th section provides that the powers of disposition conferred upon married women by the act

shall not interfere with any power which, independently of this act, may be vested in, or limited, or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act, she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

The 79th section enacts that every deed to be executed by a married woman, for any of the purposes of the act (except such as may be executed by her as protector, for the sole purpose of giving her consent to the disposition of a tenant in tail), shall be acknowledged by her before a judge of one of the superior courts at Westminster, or a master in Chancery, or before *two* of the perpetual commissioners, or *two* special commissioners, to be respectively appointed as by the act is provided.

Acknowledgments required of married women.

The 80th section requires the judges, masters, or commissioners, respectively, before receiving the acknowledgment of any married woman, to examine her apart from her husband, touching her knowledge of such deed, to ascertain whether she freely and voluntarily consents

Examination apart from her husband.

(*m*) See 8 & 9 Vict. c. 106 ; by section 6 of which enactment contingent and other like interests, also rights of entry, are made alienable by deed, saving estates in tail ; and as regards married women conformity to the Fines and Recoveries

Act is enjoined. By section 7, capacity is given to married women to disclaim estates or interests by deed ; but such disclaimers to be in conformity with the Fines and Recoveries Act.

REAL ESTATE.

thereto; and unless she do so, shall not permit her to acknowledge the same; and such deed, so far as relates to her execution thereof, shall be void.

The 81st section authorises the Lord Chief Justice of the court of Common Pleas to appoint proper persons to be perpetual commissioners for every county, riding, division, soke, or place, for which there may be a clerk of the peace, &c.

The 82nd section enacts that the perpetual commissioners may exercise their powers without reference to the question where the married woman may reside, or where the property may be situate. But it has been decided that they must *both* be appointed for the locality in which the acknowledgment is taken (n). It has also been decided that they have a lien for their fees on the deed and other documents incident to its execution (o).

Case of a married woman being beyond seas, or ill, &c.

The 83rd section makes provision for the case of a married woman being beyond the seas, or being by ill health or any other sufficient cause prevented from making her acknowledgment before a judge, master, or perpetual commissioners; in which cases the court of Common Pleas, or any judge thereof, may issue a commission appointing persons to be therein named special commissioners for taking such acknowledgment, such commission to be returnable within a time to be fixed by the court, or judge.

Memorandum and certificate.

The 84th section enacts that the person or persons taking the acknowledgment shall sign a memorandum on the deed, stating the acknowledgment and previous examination, and shall also sign a separate certificate on parchment of the acknowledgment and examination, and

(n) Webster and Wife to Carline, 4 Man. & Gr. 27; 1 Dowl. N. G. 678. The clause is extremely ob-

scure, though short. But I conceive the above is the meaning.

(o) Exp. Grove, 3 Bing. N. C. 304.

that the married woman was at the time of full age and competent understanding.

REAL ESTATE.

The 85th section enacts that the above certificate, "together with an affidavit by some person verifying the same, and the signature thereof," shall be lodged with a certain officer of the court of Common Pleas, to be appointed as by the act is directed; and such officer shall see that the certificate is duly signed by some judge or master, or by two commissioners, and duly verified by affidavit, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required; and if the requisites have been complied with, then he is to cause the certificate and the affidavit to be filed of record in the said court.

The 86th section enacts that on such filing of the certificate the deed shall take effect by relation back from the time of the acknowledgment.

To be filed of record.

The 87th section gives direction for the making and keeping of an index to the said certificates, for the assistance of parties making reference thereto.

The 88th section directs the proper officer to deliver copies of the certificates when required, and declares such copies to be evidence of the acknowledgment.

The 89th section prescribes the appointment of the proper officer for these purposes, and authorises the court of Common Pleas to make orders and regulations touching the mode of examination to be pursued by *commissioners (p)*; touching the contents of memorandums, certificates, and affidavits; the time within which such proceedings shall take place, the fees to be paid for copies, and for taking acknowledgments, and generally for the proceedings, matters, and things, required by the act to be performed.

(p) But not by judges or masters, as they are presumed to require no direction.

REAL ESTATE.

The 90th section enacts that married women shall be separately examined on the surrender of equitable estates in copyholds, in the same manner as if they were estates at law.

Rules and regulations of the Court of Common Pleas, and decisions thereon.

Such are the provisions of the 3 & 4 Will. 4, c. 74, enabling married women to alienate their real estates. The orders and regulations of the court of Common Pleas made in pursuance of the act, and the decisions respecting them, I reserve for the Appendix (*g*).

Agreement for sale of wife's estate.

An agreement by a feme covert for the sale of her estate cannot be enforced at law or in equity (*r*); unless the estate be settled to her separate use, (without restraint upon anticipation), for then she can deal with it as a feme sole (*s*); nor will an agreement by her husband bind her (*t*).

Sir Edward Sugden considers it doubtful whether a married woman, having a power of appointment, can bind herself by a contract to sell the property (*u*).

Feme covert cannot be compelled to convey.

By the old law it would appear that if a husband agreed to convey his wife's estate, he might be compelled to execute the contract by getting her to levy a fine. But whether that law now holds may be regarded as more than doubtful (*x*). Indeed Lord Eldon seemed but little disposed to countenance it (*y*); for he said that if a man chose to contract for the estate of a married woman, he knew the property to be *hers*; and if she refused to convey, why should he not be contented with damages against the husband? In a case in the court of Common Pleas (*z*), where an action was brought on a covenant by a husband,

(*g*) See Appendix, No. 1.

(*r*) *Emery v. Wase*, 5 Ves. 846.

(*s*) Sug. V. & P., 11th ed., 230.

(*t*) *Martin v. Mitchell*, 2 Jac. & W. 413; Sug. V. & P., *ubi sup.*

(*u*) Sug. V. & P., 11th ed., 231.

(*x*) See *Frederick v. Coxwell*, 3 You. & Jervis, 514.

(*y*) *Davies v. Jones*, 1 Bos. & Pul. New Rep. 267.

(*z*) *Emery v. Wase*, 8 Ves. 505; Sug. V. & P., 11th ed., 231.

whereby he undertook that he and his wife would levy a fine, and he could not procure her concurrence, the Chief Justice said that the covenant was such as the court of Chancery would not now enforce.

REAL ESTATE.

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But suppose the agreement is not by the husband, but by the wife herself *before her marriage*. Is she in that case compellable to convey *after* the marriage? This question has very recently been decided by Lord Chancellor Cottenham in the negative. In *Jordan v. Jones* (a) the plaintiff was equitable mortgagee of an estate by virtue of a deposit of title deeds made by Mrs. Jones *dum sola*, she being at the time mortgagee in fee of the estate. The suit was for a foreclosure of the mortgage or a sale. By the decree it was ordered that the estate should be sold, and that all proper parties should join in the conveyance as the Master should direct. The estate was accordingly sold; and the purchaser, having paid his money into court, was let into possession; but Mrs. Jones and her husband refused to execute the deed of conveyance, whereupon an order was made by Vice-Chancellor Wigram, that Mrs. Jones should execute a conveyance pursuant to the decree, and acknowledge it before a master or commissioner, as required by the Fines and Recoveries Act (b). But, upon appeal, the Lord Chancellor reversed His Honor's order, being, after some hesitation, of opinion "that the court had no authority to make such an order against a married woman." Much learning in the books on this subject is therefore brushed away.

*Jordan v. Jones.*

As the wife cannot alienate her real estate without her husband's concurrence, so neither can she charge it. And as the act of alienation must be free and voluntary on her

Charges upon the fee of the wife's estate.

(a) 2 Phill. 170.

(b) See *supra*, p. 28.

**REAL ESTATE.**

part, so likewise must the act of charging be ; the provisions for taking the acknowledgments of married women, already set forth, being applicable in every case where the ultimate fee, or inheritance, of the wife's estate is affected, whether by total or partial disposition.

**Mortgages for husband's debts.**

Accordingly, when the wife joins the husband in mortgaging her estate for payment of his debts, the ceremonial appointed by the Fines and Recoveries Act must be gone through as literally as if an irredeemable conveyance were intended.

**Equity of redemption to whom reserved.**

Upon mortgages thus executed of the wife's estate, very nice and difficult questions occasionally arise. In general, it will be construed that the equity of redemption remains in the wife and her heirs. But it may happen, and has been often found, that the equity of redemption is transferred to the husband and his heirs. The consideration of this subject will be more conveniently dealt with when we come to examine the rights which arise to the widow on the dissolution of the marriage by the death of the husband; on which occasion we shall also direct attention to another topic of a cognate nature, namely, the equity of the wife to have her estate exonerated out of her husband's assets, from incumbrances imposed on it during the coverture in respect of his debts.

**Wife's right of exoneration.**

SECTION IV.

FRAUDS ON THE MARITAL RIGHT, &c.

FRAUDS ON MARITAL RIGHT.

1. <i>Disposition by wife during treaty of marriage</i> . . . 35	5. <i>England v. Downes</i> . . . 37
2. <i>Relieved against, as a fraud on the husband</i> . . . 36	6. <i>Wills revoked by marriage</i> . 37
3. <i>Socus if made before the treaty and meritorious</i> . . 36	7. <i>Law before the recent Wills Act</i> 37
4. <i>Or if husband knew of it</i> . 36	8. <i>Submission to arbitration</i> . 38
	9. <i>Power of Attorney</i> . . 38

THUS we have seen that the wife's chattels personal in possession, her goods and specific chattels, her chattels real, and her real estate, are placed by the marriage, if not entirely at the absolute disposal, yet certainly under the dominion and government of the husband for the coverture.

Being then legally entitled to the benefit of all his wife's property, it follows that she ought to do nothing during the matrimonial treaty whereby the marital right may be defeated or impaired. Any covert disposition of her property during the courtship will be considered a fraud upon him, from the consequences of which he will be entitled to relief (a). Thus in the case of *Goddard v. Snow* (b), a woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement.

Covert disposition by wife during treaty of marriage.

(a) The leading case on this subject is *Strathmore v. Bowes*, 2 Bro. C. C. 345. 1 Ves. jun. 22, 28. See also *Howard v. Hooker*, 2 Cha. Rep. 81; 1 Eq. Ca. Abr. 59. *Carlton v. Earl of Dorset*, 2 Vern. 17, where, so

early as 1686, it was decided that a settlement made by a woman before her marriage for her separate use, without the husband's privity, was void as against him.

(b) 1 Russ. 485.

## FRAUDS ON MARITAL RIGHT.

Relieved against,  
as a fraud on the  
husband.

Ten years afterwards she died. After her death he filed a bill to have the money paid to him, and it was held by Lord Gifford, M.R., that the settlement was void as being a fraud on the marital right. The clandestinity of the proceeding is a material element from which fraud will be inferred (c). For it does not appear necessary to make out a case of actual and positive deception (d). However, a conveyance made, even immediately before marriage, is, *primâ facie*, good (e), and is to be impeached only on proof of fraud; and whether such fraud is established must depend on the circumstances of each case.

Secus if before  
the treaty and  
meritorious.

If the object of the transaction be meritorious, and if it be before the marriage treaty, it will not be disturbed. Thus, in *King v. Cotton* (f), where Lady Cotton, having ten children by her first marriage, made a suitable provision for them, and subsequently entered into a treaty for a second marriage, in course of which she made no disclosure of the settlement which she had made in favour of these children: it was held by Lord Chancellor King that "it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband, and this being before her treaty with Mr. King," his bill should be dismissed. In another case of more recent date, *St. George v. Wake* (g), a lady, while her treaty of marriage was actually in progress, assigned part of her property to her sister; but there were circumstances which were held to warrant a presumption that the husband had had notice of the assignment before his marriage; and on that ground Lord Chancellor Brougham

(c) *England v. Downes*, 2 Beav. 522.

(d) *Taylor v. Pugh*, 1, Hare 608.

(e) Per Lord Langdale in *England v. Downes*, 2 Beav. 522. But see 1 Roper, 166, where Mr. Jacob in

a note says, "a conveyance made during the treaty of marriage is *primâ facie* fraudulent."

(f) 2 P. Wms. 675.

(g) 1 Myl. & Kee. 610.



held that the husband was precluded from impeaching it; for if a man, knowing what has been done, still thinks fit to marry the lady, he cannot be permitted to allege, afterwards, that he has been deceived. Actual concurrence on the part of the intended husband in a settlement made by the wife before marriage, will be still more conclusive against him; and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right (*h*).

WILL REVOKED  
BY MARRIAGE.

Or if husband  
knew of it.

And still more if  
he concurred in it.

The husband seeking redress must show, not only that a marriage was contemplated by his wife at the time of the transaction challenged, but that *he* was the person intended. Thus, in *England v. Downes* (*i*), it appeared that a widow, with a view to a second marriage, made a settlement of her property, in August, 1818, on herself for life for her separate use, with remainder to the children of her first marriage. On the 26th of October, in the same year, she married one Broad. No evidence was read to show that Mr. Broad was the person with whom she had contemplated a marriage at the date of the settlement. There was therefore no proof that it was executed pending any treaty with *him*, so that Lord Langdale held the deed unimpeachable on *his* part.

It must be a  
fraud on the par-  
ticular husband  
complaining.

By the 1 Vict. c. 26, s. 18, it is enacted, that "every will made by a man or woman shall be revoked by his or her marriage; (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as his next of kin under the Statute of Distributions)." This applies to all wills made after the 1st January, 1838.

Wills revoked by  
marriage.

Before the passing of the act, a will made by a woman

Law before the  
late Wills Act.

(*h*) *Slawcombe v. Glubb*, 2 Bro. C. C. 545; 1 Rep. 166,

(*i*) 2 Beav. 522.

SUBMISSION TO  
ARBITRATION  
REVOKED.

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dum sola, was revoked by her subsequent marriage. But when a man made a will it was not revoked by his subsequent marriage alone, but was revoked by marriage and the birth of a child. The principles on which the distinctions rested are ably expounded by Mr. Justice Williams in his valuable work on executors and administrators (*k*).

Submission to  
arbitration.

A submission to arbitration will be revoked if one of the parties, being a single woman, marry before the award. And it will make no difference that the arbitrator in making his award had no notice of the marriage (*l*).

Warrant of  
attorney.

It is said, but not without reasons to the contrary, that if the wife, dum sola, execute a warrant of attorney, it will by her subsequent marriage be revoked (*m*). On the other hand, if, while single, she *accept* a warrant of attorney, it will not be revoked by her subsequent marriage; and the Court will give leave to enter up judgment upon it (*n*).

(*k*) Vol. 1, 136.

(*m*) 2 Rep. 68.

(*l*) 1 Bac. Abr. 270; *Charnley v. Winstanley*, 5 East, 266; 2 Rep. 72.

(*n*) *Marder v. Lee*, 3 Bur. 4069.

## CHAPTER II.

### LIABILITIES ARISING FROM THE MARRIAGE.

#### SECTION I.

#### HUSBAND'S RESPONSIBILITY FOR WIFE'S PRIOR DEBTS, &c.

#### WIFE'S PRIOR DEBTS, &c.

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|---|--|
| <ol style="list-style-type: none"> <li>1. <i>Husband's liability for wife's prior obligations</i> . . . . . 39</li> <li>2. <i>She still continues liable, though protected from execution</i> . . . . . 40</li> <li>3. <i>Unless she have separate property</i> . . . . . 40</li> </ol> | <ol style="list-style-type: none"> <li>4. <i>Husband's liability ceases with the marriage</i> . . . . . 40</li> <li>5. <i>Newton v. Roe</i> . . . . . 41</li> <li>6. <i>Evans v. Chester</i> . . . . . 41</li> <li>7. <i>Evidence required to charge the husband</i> . . . . . 41</li> </ol> |
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THE liabilities arising from the marriage, are all on the husband's side. He becomes immediately bound for his wife's prior debts, of whatever amount (a); and whether he has had any fortune by her or not. He is answerable for the consequences of a breach of trust committed by her before marriage. In *Palmer v. Wakefield* (b), where a

The liabilities  
are all on the  
husband's side.

(a) To a declaration against husband and wife for a debt due from the wife before coverture, the husband's discharge under the Insolvent Act is a good plea. *Lockwood v. Salter*, 5 Barn. & Ad. 303. A discharge of the wife under the Insolvent Debtors Act, 7 Geo. 4, c. 57, before marriage, is a bar to an action against the husband and wife in re-

spect of one of the scheduled debts, and semble that where a discharged female insolvent acquires property, and marries, whereby it vests in her husband, the act affords no remedy by which it can be made available to her former creditors; and this *Cole-ridge, J.*, thought an oversight. *Storr v. Lee*, 9 Adol. & Ell. 868.

(b) 3 Beav. 227.

**WIFE'S PRIOR DEBTS, &C.**

He takes his wife subject to her prior debts and obligations.

The wife continues liable for her prior debts, but is protected from personal execution, unless she have separate property.

His liabilities for her cease, however, with the marriage.

woman when sole had become responsible in this way, and the question was whether her after-taken husband should make good the loss sustained by the trust estate, Lord Langdale said: "In this situation she married Mr. Wakefield; and it was by the marriage and by his assuming the liabilities to which *she* was subject that he also, as I think, became liable to pay the money." So that, as Blackstone (c) says, the husband must be considered to have "adopted her and her circumstances together" (d).

But although the effect of the marriage is to charge the husband with the wife's prior debts, it is not thence to be inferred that she is thereupon relieved from them. On the contrary, her liability continues, with this qualification; that she is protected by her coverture from personal execution, unless it appear that she has separate property; that is to say, property enjoyed by her as a feme sole. The reason of this is obvious. And, therefore, where a wife, under such circumstances, is taken in execution, she must satisfy the Court that she has no separate property; otherwise she will not be discharged. In *Sparkes v. Bell* (e), Mr. Justice Bayley said that the rule was correctly laid down by Mr. Tidd (f), who states that "in an action against husband and wife, both may be taken in execution; and when the wife is taken, she shall not be discharged

(c) Book i. c. 15, p. 443.

(d) The husband's liability, however, as it originated in the marriage, ceases with it; so that if the obligation be not enforced in the lifetime of the wife, the surviving husband cannot be charged either at law or in equity, should he have had ever so large a fortune with her. This, however, applies only to property falling under his marital right, and not to his wife's choses in action; which, as

we shall see hereafter, he takes at her death as her administrator. But, even subject to this limitation, the justice of a law may well be doubted which permits the husband to pocket his wife's fortune and bid defiance to her creditors. See further on this subject, "Rights and Liabilities arising from the Dissolution of Marriage," *infra*.

(e) 8 Barn. & Cress. 1.

(f) Tidd's Pract., 9th Edition, 1026.

unless it appear that she has no separate property out of which the demand can be satisfied."

WIFE'S PRIOR  
CHILDREN.

In *Newton v. Roe* (g), execution went upon a judgment against husband and wife; but upon an affidavit that the wife had no separate property, she was discharged.

*Newton v. Roe.*

An action was commenced against a woman when sole; but after service of the writ, and before declaration, she married. The plaintiff proceeded to final judgment, and took her in execution. On a motion to discharge her out of custody, the affidavit stated the above facts, and also that no settlement had been made upon the marriage, but it did not state that she had no separate property. It was held that the affidavit was insufficient, and that she was not entitled to be discharged (h).

*Evans v. Chester.*

In order to charge the husband with the wife's prior debt, the marriage must be proved. But the evidence need not be very strict or formal where the fact of marriage is not in disputation. Thus, in an action against husband and wife, on the promissory note of the wife made dum sola, a witness stated that he knew her formerly, and had heard that she had afterwards married E. F. This was held sufficient *prima facie* evidence of marriage (i).

Evidence re-  
quired to charge  
the husband.

## SECTION II.

### HUSBAND'S OBLIGATION TO MAINTAIN WIFE'S PRIOR CHILDREN.

HUSBAND'S  
OBLIGATION  
TO MAINTAIN  
WIFE'S PRIOR  
CHILDREN.

ANOTHER consequence of the marriage is, that the husband becomes bound to maintain, *as part of his family*,

(g) 7 Man. & Gr. 329.

(i) *Evans v. Morgan*, 2 Crompt. &

(h) *Evans v. Chester*, 2 Mee. & Jer. 453.

Wel. 847.

**HUSBAND'S  
OBLIGATION  
TO MAINTAIN  
WIFE'S PRIOR  
CHILDREN.**

any child or children, till the age of sixteen, legitimate or illegitimate, that his wife may have at the time of entering into the contract. This obligation is imposed by the 4 & 5 Will. 4, c. 76, s. 57 (*k*). Whatever may have been the intention of the legislature, I do not see any words in the Act limiting this provision to persons in humble life.

SECTION III.

**HUSBAND'S  
OBLIGATION TO  
MAINTAIN  
WIFE.**

**HUSBAND'S OBLIGATION TO SUPPORT HIS WIFE.**

- |  |   |
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| 2. <i>Can be directly enforced by the parish only</i> . . . 42 |   |

Extent of this obligation.

In a direct manner, can be enforced by the parish only.

AGAIN, the marriage, which confers on the husband the control of his wife's person and estate, imposes on him also the duty of maintaining her; a duty which stands on a foundation of manifest justice; although the *direct methods* assigned by law to enforce it have for their objects anything rather than to vindicate the rights of injured married women. The only *legal* reason why a husband should support his wife is, that she may not become a burden on the parish. So long as that calamity is averted, the wife has no claim on her husband. And in fact she has no direct claim upon him under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief. And then the parish authorities will insist that the husband shall provide for her, when he is able, to the extent at least of sustaining life (*l*). If a husband fail in this respect, so that his wife becomes chargeable to any parish, the

(*k*) 7 Adol. & Ell. 819.

(*l*) *Rex. v. Hinton*, 1 Barn. & Ad. 227.

5 Geo. 4, c. 83, s. 3 says, that "he shall be deemed an idle and disorderly person, and shall be punishable with imprisonment and hard labour" (m).

HUSBAND'S  
OBLIGATION  
TO MAINTAIN  
WIFE.

---

(m) But that which cannot be enforced by the wife as matter of *direct obligation*, is generally attained in another way. In a word, the wife, as her husband's agent, can bind him for necessities furnished to her by third parties. The husband's

liability, however, for such furnishings arises, not from the marriage, but from *acts done in the marriage state*. See therefore, "Liabilities arising from Acts done in the Marriage state," *infra*.

Indirect methods  
by which the wife  
can compel her  
husband to main-  
tain her.

## CHAPTER III.

### RIGHTS ARISING FROM ACTS DONE IN THE MARRIAGE STATE.

#### SECTION I.

#### THE WIFE'S EARNINGS.

##### WIFE'S EARN- INGS, &c.

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|--|--|---|

Belong exclu-  
sively to the hus-  
band.

She cannot con-  
tract.

Nor give a dis-  
charge.

If a payment is  
made to her there  
must be proof of  
her authority to  
receive it.

To the produce of the wife's industry, in whatever way exerted, during the union, the husband, and not the wife herself, is entitled; the disabilities of coverture preventing her from making any contract or agreement except as his instrument and agent; and therefore, whatever income or return may accrue from any act done by her in the marriage state must belong to him as her principal. And he alone can give a discharge for any demand arising from her services; or at all events if the debtor rely on a discharge from her, he must aver and prove that she gave it in the character of agent for her husband. Put the case, therefore, of a married woman acting in a family as nurse or laundress; and that her husband brings an action for her charges; and suppose that the defendant, who peradventure knows nothing of her husband, relies on payments made to her: such payments would be no answer to the action unless they were alleged and shown to have been received



by her with the assent of her husband. Thus, in *Offley v. Clay* (a), to a count for work done and attendance given by A. (the wife of the plaintiff) for the defendants and at their requests, the defendants pleaded payments made from time to time to the wife, and acceptance by her, in satisfaction of the cause of action. The plea was held bad for not averring that the wife was authorised by the plaintiff to receive the payment (b).

WIFE'S EARN-  
INGS, &c.

Upon the same principle of individual incapacity, the wife, where a bill of exchange or promissory note is given to her, receives it as agent for her husband. He alone can indorse (c) or sue on it. And so absolute is the right vested in him, that in such a case the party sued on the bill or note will not be allowed the benefit of set-off in respect of a debt which was due to him from the wife *dum sola* (d). This is certainly going a great way, considering that the husband by the marriage becomes responsible for the debts of the wife contracted by her when sole.

Bill or note pay-  
able to her as a  
married woman.

If a bond be given to husband and wife, the husband alone may declare on it as on a bond made to himself (e). So likewise a legacy left to a married woman must be paid to her husband; and payment to herself will be bad (f).

Bond.

(a) 2 Man. & Gr. 172.

(b) The points marked for the plaintiff were, that the plea was bad, for that no authority was averred to have been given by the plaintiff to his wife for her to accept the said sum as therein alleged, and for the other cause of demurrer specially assigned. The points marked for the defendants were, that, as it necessarily follows from the allegations in the first count that the wife had the authority of the husband to earn the

money, she must also have had authority to receive it, and that the allegation of acceptance by the wife is therefore equivalent to an allegation of acceptance by the husband.

(c) *Mason v. Moryan*, 2 Adol. & Ell. 30.

(d) *Burrough v. Moss*, 10 Barn. & Cress. 558.

(e) *Ankerstein v. Clarke*, 4 Term Rep. 616.

(f) *Palmer v. Trevor*, 1 Vern. 261.

## SECTION II.

## WIFE'S CHATELS PERSONAL OR CHOSSES IN ACTION.

WIFE'S CHOSSES  
IN ACTION.

- |   |  |
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|---|--|

Her right not  
divested by mar-  
riage.

THE right which the wife has to what the law quaintly terms her chattels personal outstanding, or choses in action, is not divested by marriage, but is liable to be divested by an act done in the marriage state; that is to say, the husband may appropriate his wife's chattels personal outstanding or choses in action by reducing them into possession. In this way, and in this way only, can he divest her right of property and defeat her claim by survivorship.

Rule different  
from that as to  
her goods or  
specific chattels  
in the hands of  
third parties.

The wife's chattels personal outstanding or choses in action are not to be confounded with her goods or specific chattels in the hands of third parties; for which the husband alone may, as we have seen (a), bring trover or detinue or replevin; for the property which she had in her goods or specific chattels before the marriage is by the marriage taken out of her and vested in her husband; whereas the

(a) *Supra*, p. 19.

right which before the marriage she had to her choses in action remains in her, notwithstanding the marriage, unless something be done in the marriage state, whereby that right is put an end to.

WIFE'S CHOSSES  
IN ACTION.

The wife's chattels personal outstanding or choses in action may consist of debts due to her, arrears of rent (*b*), legacies, residuary personal estate, trust funds, stock, &c., to which are to be added bills of exchange and promissory notes payable to her, which, though unlike other choses in action in being legally assignable, are nevertheless choses in action of a peculiar nature (*c*).

Of what the wife's  
choses in action  
may consist.

I have indeed seen it nowhere so determined, but I apprehend that a wife's general cash balance at her banker's *dum sola* must be included in the list of her choses in action (*d*).

But although the property in the wife's choses in action is not changed by the marriage, yet by the marriage the husband acquires a power of suing for and recovering them; and so making them his own, by converting them in fact into chattels personal in possession. And payment ought, during the marriage, to be made to the husband, not to the wife, except as his agent. Thus, where a legacy was bequeathed to a *feme covert*, the executor, having paid it to her, was decreed by Lord Keeper North to pay it over again to the husband. The case, a remarkable one, was as follows:—

(*b*) In a suit to carry into execution the trusts of a will, it was ordered that the receiver should, out of the rents, pay to H., the devisee, a *feme covert*, 400*l.* a year for her separate use, and on her own receipt, by way of maintenance. It was held by Lord Chancellor Sugden that this allowance was not a chose in action; that it was a portion of the estate of H. in the lands; and that it

was not an interest therein distinct from the estate vested in her. *Ro-  
chard v. Fulton*, 1 Jones & Lat. 413.

(*c*) *Gaten v. Maddeley*, 6 Mee. & Wel. 423. *Nash v. Nash*, 2 Mad. 133, 1 Rep. 211.

(*d*) See *supra*, p. 19, where it is shewn that such general balance does not fall under the description of chattels personal in possession.

**WIFE'S CHOSSES  
IN ACTION.**

A. B. devised 100*l.* to the plaintiff's wife, to be paid within six months after his death ; and a bill being filed for this legacy, the defence which the executor made was, that he had paid the legacy to the plaintiff's wife, and had her receipt for it. He insisted further, that at the time of making this will the plaintiff and his wife were parted, which was then well known to the testator. But the Lord Keeper held it to be no good payment ; and decreed the legacy to be paid to the plaintiff with interest, it being to be paid by the will at a certain time ; viz., within six months after the testator's death.

Sir Thomas  
Plumer's defini-  
tion.

The law on the subject of the wife's chattels personal outstanding, or choses in action, underwent an elaborate expiscation by an industrious judge in the well-known case of *Purdew v. Jackson* (e). There Sir Thomas Plumer observes, that, although the nature of the husband's interest in, and power over, his wife's outstanding personal chattels is peculiar, yet the law defines it in the clearest manner. "Marriage," he says, "is only a qualified gift to the husband of the wife's choses in action upon condition that he reduce them into possession during its continuance. The wife's right is not divested by the marriage. The chose in action continues to belong to her ; so that, if the husband happen to die before his wife, she, and not his personal representative, will be entitled to it. The husband, therefore, acquires no right to his wife's chose in action. Reduction into possession is a necessary and indispensable preliminary to his having any right of property in himself, or to his being able to convey any right of property to another. If he does not perform this condition in his lifetime, the right of his widow after his death continues unaltered, exactly as if she had never married."

What shall be a  
sufficient reduc-  
tion into posses-  
sion by the hus-  
band.

What shall be a sufficient reduction into possession by the husband to bar the wife's survivorship is to be col-

(e) 1 Russ. 1.

lected from the cases. Mere intention will not do. There must be *acts*; and those acts must have the effect of divesting the right of property in the wife and establishing it in the husband absolutely. The property, in a word, must actually be *changed* (f).

WIFE'S CHOSES  
IN ACTION.

Thus, public stock transferred into the name of a married woman will survive to her, unless the husband in his lifetime have exercised some sort of dominion over it. In *Wildman v. Wildman* (g); a wife having become entitled to a distributive share of personal estate, consisting of Three per Cent. stock, the administrator transferred her share to her name describing her as the wife of John Wildman; and so it stood at his death; except that she had transferred part of it with the assent of her husband, signified by his signing his name to each transfer. The question was, whether the remaining stock constituted part of the husband's estate, or belonged to her by survivorship: Sir W. Grant, observed—

It is said, the transfer of stock into her name is equivalent to payment made to her; and as, if the money had been paid to her it would have become the husband's property, so likewise shall stock transferred to her in satisfaction of the claim he might have made in her right. But there is a great difference between a transfer of stock and a payment of money. The interest in stock is properly nothing but a right to receive a perpetual annuity subject to redemption; a mere right therefore. The circumstance that the government is the debtor makes no difference; a mere demand of the dividends as they become due having no resemblance to a chattel moveable, or coined money capable of possession and manual apprehension. Without any act of dominion exercised by the husband, the acts he has done are all of a contrary tendency. They are indications of assent to *her* exercising dominion over the stock. He has not joined with her as a transferring party; but concurs in the very act by which she assumes to be the sole owner. Being therefore of opinion that the transfer to her did not vest the property in her husband; and being quite clear that he

Exposition by Sir  
W. Grant.

(f) *Blunt v. Bestland*, 5 Ves. 515.

(g) 9 Ves. 174.

WIFE'S CHOSES  
IN ACTION.Cases in con-  
formity with it.

has not done any act to reduce it into possession, it follows that the claim (of the husband's next of kin) cannot be supported.

These principles are followed out in *Ryland v. Smith* (*h*), before Lord Cottenham at the Rolls. There a married woman being entitled to stock and to cash forming part of a residue, her husband wrote to one of the executors requesting that the stock should be transferred into the names of certain trustees for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the cash in increasing the amount of the stock. He afterwards became bankrupt and died. And it was held that the stock transferred was not reduced into possession, and therefore belonged to the wife by survivorship; but that the assignees were entitled to the increase made by the husband. And in *Harwood v. Fisher* (*i*), where the first husband of a woman entitled to a legacy of 600*l.*, chargeable in default of personalty on the testator's real estate, verbally agreed with the three devisees to sell the legacy to them for 200*l.* a-piece, but received the consideration from one only of the three, taking interest on the 400*l.* due from the two others, it was held that to the extent of the 400*l.* this was not a reduction into possession, and that to a suit instituted by the woman and her second husband, the representatives of the first husband were not necessary parties.

Bond to wife. Receipt of interest, not a reduction into possession.

If a bond be given to the wife, and the husband does not reduce it into possession, it will survive to the wife (*j*). The receipt of interest by the husband is not a reduction of the principal fund into possession (*k*).

(*h*) 1 Myl. & Cra. 53.

(*i*) 1 You. & Col. Cha. Ca. 110.

(*j*) *Coppin v. —*, 2 P. Wms. 497; *Day v. Padrone*, 2 Mau. &

Sel. 396 n.; 1 Rep. 212.

(*k*) *Howman v. Corie*, 2 Vern. 190.

*Hart v. Stephens*, 6 Q. B. Rep. 937.

A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing in the name of a trustee for her. This stock was, under an order made in the lunacy, transferred to the name of the Accountant-General in the matter of the lunacy; and part of it was afterwards sold out and applied in payment of the costs. The lunatic died, leaving the wife him surviving. In these circumstances it was held by Lord Chancellor Lyndhurst, that the stock had been reduced into the possession of the lunatic; and that the wife was not entitled to it by right of survivorship (*k*).

WIFE'S CHOSE  
IN ACTION.

Husband lunatic—wife his committee—transfer of her stock to the lunacy a sufficient reduction into possession.

Where a chose in action of the wife is to be reduced into possession, and an action is necessary for the purpose, it must be brought in the names of both the husband and the wife (*l*). Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action, it was held that it thereby abated, and that the defendant could not afterwards have judgment as in case of nonsuit (*m*).

How wife's chose in action recovered.

As to the wife's negotiable securities, however, bills of exchange and promissory notes, which were made payable to her when sole, the rule is different. These are indeed choses in action, but yet of a peculiar nature. They, to a

Peculiarity as to wife's negotiable securities.

(*k*) Re Jenkins, 5 Rus. 183.

(*l*) Per Lord Kenyon, C. J., in *Milner v. Milnes*, 3 Term Rep. 631. When the chose in action accrues due, not while the wife was sole, but during the coverture, it has been said that it is optional in the husband to join his wife as co-plaintiff. But in *Wills v. Nurse*, 1 Adol. & Ell. 75, Tindal, C. J., (delivering the judgment of the Exchequer Chamber on a writ of error) said—"This

case resembles that of a bond given to the wife during coverture. The interest of the wife forms a substratum upon which her right to join in an action may be founded." See also *Hart v. Stephens*, 6 Q. B. Rep. 937. But see *infra*, "Rights arising from the dissolution of the marriage by the death of the husband," and "by the death of the wife."

(*m*) *Checchi & Rex v. Powell*, 6 Barn. & Cres. 253.

WIFE'S CHOSSES  
IN ACTION.

certain extent, resemble chattels personal in possession. The husband alone, and not the wife, can indorse them; and, by so doing, give his indorsee the right of suing on them in his own name (*o*). He is therefore held to have the same right in himself; for he alone, and not his wife, can recover payment of them. She is not necessarily joined in the action as co-plaintiff (*p*). Still, if the husband die without having reduced them into possession, these securities will shew their true character as chosses in action by surviving to the wife (*q*).

In what cases  
judgment will  
survive to the  
wife.

It has been ruled that if the wife be named as a co-plaintiff in an action for the recovery of a chose in action, and the husband die after judgment, but before the suing out of execution, the judgment will survive to her (*r*).

On the other hand, if before the marriage she have obtained a judgment, and she and her husband sue out a scire facias, and obtain an award of execution, the property will be changed by the award and belong to the husband (*s*).

Effect of joint  
decree same as  
joint judgment.

As a joint judgment will survive to the wife if her husband die before execution is awarded; so will a joint decree, unless an order have been obtained to pay the money, or declaring that it belongs, to the husband (*t*).

Effect of an  
award.

By analogy, a mere award by an arbitrator ought not to be sufficient to change the property. But in *Oglander*

(*o*) *Barlow v. East*, 1 East, 432; 1 Rep. 214.

(*p*) *M'Neillage v. Holloway*, 1 Barn. & Ald. 48. *Exp. Barber*, 1 Glyn & Ja. 1.

(*q*) See further on this subject, *infra*, "Rights arising from the dissolution of the marriage by the

death of the husband;" and "by the death of the wife."

(*r*) 1 Rep. 212, and the cases there cited.

(*s*) 1 Rep. 212.

(*t*) 1 Rep. 216; 10 Ves. 91: and see *Hcygate v. Annesley*, 3 Bro. C. C. 362.



v. *Baston* (u), the contrary was holden. There, however, the award was expressly to *pay to the husband*. Before any further proceedings, he died. His wife's claim was held to have been defeated.

WIFE'S CHOSES  
IN ACTION.

In *Tilt v. Bartlett* (v), costs ordered by rule of court to be paid to husband and wife were held to survive to her.

Pending a suit in equity an agreement disapproved of by the Court will not exclude the wife's claim by survivorship (w).

Agreement pendente lite.

Actual receipt of the money by the husband of course defeats the claim of the wife by survivorship; and it would seem that a transfer of the wife's stock into the husband's sole name ought to have the same effect. But the possession thus acquired must be in the character of *husband*; and not of trustee or executor (x).

Actual receipt by husband.

The effect of the husband's failure to reduce the wife's choses in action into possession is, that in the event of his predeceasing her she is entitled to them by survivorship; and in the event of her predeceasing him, he, in order to get at them, must take out administration to her (y).

Effect of failure to reduce into possession.

Should the husband, after the wife's death, himself die before her outstanding personal chattels are recovered, his next of kin will be entitled to them in equity (z).

(u) 1 Vern. 396; 1 Rep. 219.

(v) Hanmer, 104.

(w) *Macaulay v. Phillips*, 4 Ves. 15.

(x) *Baker v. Hall*, 12 Ves. 497.  
*Wall v. Tomlinson*, 16 Ves. 413.

(y) See further on this subject, "Rights arising from the dissolution of the marriage by the death of the husband;" and, "by the death of the wife;" *infra*. In particular, see remarks on *Gaters v. Madeley*, 6 Mee. & Wel. 427, and *Skerrington v. Yates*, 12 Mee. & Wel. 855.

(z) But by the rule of Doc-

tors' Commons, the *wife's* next of kin will be entitled to letters of administration *de bonis non* of her estate not received by her husband during his life. They, however, will be trustees of what they receive for the husband's next of kin, 1 Rep. 205, note; and see 1 P. Wms. 378, 381. *Humphrey v. Bullen*, 1 Atk. 458. *Elliot v. Collier*, 3 Atk. 526. In *Burnet v. Kynaston*, according to the reports in 2 Freeman, 239, and Pre. in Cha. 118, the contrary was holden; but the point is now settled. The Rules

WIFE'S CHOSES  
IN ACTION.

In a case, therefore, where the wife had been a mortgagee in fee, her surviving husband was held entitled to the mortgage as her administrator, and her heir was considered to be a trustee for him. This was admitted in *Turner v. Crane* (a).

## SECTION III.

ASSIGNMENT OF  
WIFE'S CHOSE  
IN ACTION.ASSIGNMENT OF THE WIFE'S PERSONAL CHATTEL OR  
CHOSE IN ACTION.

- |   |    |  |    |
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| 4. <i>Where the chose, neither at the time of the assignment nor afterwards, was capable of reduction into possession</i> . . . . . | 56 | 11. <i>Effect of an assignment of the prior interest to the reversioner femme couverte</i> . . . . . | 63 |
| 5. <i>Where it becomes capable of such reduction after the assignment</i> . . . . .   | 57 | 12. <i>Assignment valueless unless followed by reduction into possession</i> . . . . .               | 65 |
| 6. <i>Where, both at the time of the assignment and afterwards, the chose was capable of such reduction</i> . . . . .               | 57 | 13. <i>Assignment in bankruptcy subject to same rule</i> . . . . .                                   | 66 |
| 7. <i>Wife's life interest beyond the coverture. Stiffe v. Everitt</i> . . . . .  | 58 | 14. <i>Husband's assignees in bankruptcy cannot sue in their own names alone</i> . . . . .           | 66 |

Assignment in  
equity.

THE husband's power of reducing his wife's chose in action into possession may be assigned in equity though not at law. That is to say, a court of equity will, in a case otherwise unobjectionable, assist the husband's assignee to recover the wife's outstanding personal chattel or chose in action; for the assignee will be considered to

at Doctors' Commons often cause a circuitry in carrying out the law of the land; to the great perplexity of practitioners. But in this instance they are not to blame, as they ap-

pear to act under the 31 Edw. 6, c. 11. See Com. Dig., Bar. & Fem., (E. 3), 4th Edition, vol. ii., p. 84. (a) 1 Vern. 170; 1 Rep. 205.

have obtained the husband's power of reducing the chattel into possession ; but always subject to the wife's right by survivorship. The value of the assignment, therefore, depends upon its being made available by reduction into possession before the wife's claim can arise. For, (whatever the law may have been in former times,) it must now be regarded as a proposition placed by the decision of Sir Thomas Plumer in *Purdew v. Jackson* beyond the reach of controversy and disputation, that all assignments of the wife's outstanding personal chattel,—whether by act of the law in bankruptcy or insolvency, or by the act of the husband himself, as in the case of an assignment to trustees for payment of debts, or to a purchaser for valuable consideration,—pass only the interest which the husband himself has in the subject-matter ; namely, an interest liable to be defeated by his death before reduction into possession, leaving his wife him surviving.

ASSIGNMENT OF  
WIFE'S CHOSE  
IN ACTION.

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Effect of *Purdew*  
*v. Jackson*.

Accordingly, the assignee will be in no better situation than the assignor ; and he too must reduce the subject into possession in order to make his title good against the wife surviving.

But there was an ingenious and striking argument suggested by Lord Lyndhurst in *Honner v. Morton* (b), which, if it had been adopted in subsequent cases, would have greatly qualified the doctrine derivable from *Purdew v. Jackson*. "Equity," said his Lordship, "considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession. It likewise considers what a party agrees to do as actually done ; and, therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand, where

Argument of Lord  
Lyndhurst.

(b) 3 Rus. 68.

ASSIGNMENT OF  
WIFE'S CHOSE  
IN ACTION.

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the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property till, by subsequent events, he comes into the situation of being able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred." In a subsequent part of his judgment in the same case (c), Lord Lyndhurst says, "I revert to my original opinion, that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to have put him in a situation, which enabled him to have reduced the chose in action into possession. If at the time of the assignment he is in a condition to reduce the chose in action into possession, the assignment operates *immediately*. If he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative."

Where the chose, neither at the time of the assignment nor afterwards, was capable of reduction into possession.

Now, to invert the order of Lord Lyndhurst, take in the first place the case where the husband has, neither at the time of the assignment nor subsequently, the power of reducing the outstanding chattel into possession. Suppose that the husband and wife concur in assigning to a purchaser for valuable consideration a fund in which she has a vested interest in remainder expectant on the death of a tenant for life; and suppose, furthermore, that the tenant for life outlives the husband. Here the wife surviving will be entitled to the fund, on Lord Lyndhurst's reasoning; because the husband had not, either at the time of the assignment or subsequently, the power of reducing the outstanding chattel into possession.

This result accords with the decision in *Purdew v. Jackson*, although Sir Thomas Plumer proceeded upon no such refinement.

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Secondly, take the case where, although the husband has not the power of reducing the property into possession at the time of the assignment, he acquires that power subsequently. That was precisely the state of circumstances in *Ashby v. Ashby (d)*. There the husband assigned his reversionary chose in action to a particular assignee for value. He survived the person on whose life the reversion depended; and therefore, reduction into possession might well have taken place. Yet, inasmuch as he died before the property was actually recovered, the assignment was, by Vice-Chancellor Knight Bruce, held to be void against the surviving wife (e).

Where it becomes  
capable of such  
reduction after  
the assignment.

In the third place, let us consider the case where, upon Lord Lyndhurst's principle, the assignment would undoubtedly be valid; namely, the case where, both at the time of the assignment and subsequently, the husband had full power to reduce the property into possession. Now we shall find that here, as in the last case, his Lordship's conclusion is unsound; or at all events, was before, and has been since, judicially contradicted. For this very question was anticipated in *Purdew v. Jackson*, where Sir Thomas Plumer in course of the first argument asked, "Whether there was any case in which, the husband having assigned his wife's *present* chose in action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife?" The counsel on both sides (including Sir Lancelot Shadwell and Sir Edward

Where, both at  
the time of the  
assignment, and  
afterwards, the  
chose was capable  
of such reduction.

(d) 1 Coll. 549.

(e) His Honour in so ruling relied upon a case with which, he said, his own opinion agreed, namely,

*Ellison v. Elwyn*, 13 Sim. 309;  
12 Law J. 440 (Ch.); 7 Jurist, 337.  
See also *Hutchings v. Smith*, 9 Sim.  
137.

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Sugden) frankly owned that "they believed that such a case had not occurred." And in *Hutchings v. Smith* (f), where the argument of Lord Lyndhurst on this point is relied upon and set out at length, Sir L. Shadwell refused to give effect to it; although there were other grounds on which the case was decided. But in *Ellison v. Elwyn* (g), His Honour lays it down expressly, that whether the husband dies before the tenant for life, or whether he survives him, the property not being reduced into possession, the result must be the same; which, after all, but verifies the remark of Sir W. Grant in *Mitford v. Mitford* (h), that it would be "strange if a man should in any way be able to transfer to another a larger or better interest than he had in himself." And in the last case to be found on the point, *Le Vasseur v. Scrutton* (i), Sir L. Shadwell declared that

A husband could not assign his wife's *present* chose in action except subject to the contingency of his not reducing it into possession. He remained of the same opinion as he had expressed in *Ellison v. Elwyn* (k), which was substantially the same as the present case, and should decide accordingly; and if any doubt was entertained as to the propriety of his decision, the case might be taken either to the Lord Chancellor or to the House of Lords.

Wife's interest  
beyond the cover-  
ture.

*Stiffe v. Everitt.*

Upon the principle of *Purdew v. Jackson*, neither the husband alone, nor the husband and wife together, can dispose of the wife's life interest in a fund, beyond the duration of the coverture. This point was suggested by Lord Cottenham, upon petition in *Stiffe v. Everitt* (l), His Lordship saying he should be glad to be furnished with any cases upon it; but unless some authority were pro-

(f) 9 Sim. 137.

(g) 13 Sim. 309; 12 Law J. 440,  
(Ch.); 7 Jurist, 337.

(h) 9 Ves. 87.

(i) 14 Sim. 116.

(k) *Ubi supra*, p. 57.

(l) 1 Myl. & Cra. 37.

duced, he must decline to make the order (m). A search having been made for authorities, and none having been found, His Lordship on a subsequent day said, "When this petition came on to be heard, I suggested a difficulty with respect to the power of the husband to dispose of his wife's life interest; and the petition stood over for the purpose of enabling the petitioners' counsel to produce cases in favour of such right. I have since been informed that there are no such cases to be found. It is, I believe, certain that there are none; and the question is, whether, consistently with *Purdew v. Jackson* and *Honner v. Morton* (n), any such power can exist. This very point is just alluded to in a note to *Purdew v. Jackson* (o), but there is no decision upon it. I do not see how, consistently with the cases of *Purdew v. Jackson* and *Honner v. Morton*, the husband can make a title to such of the dividends of the fund as may accrue after his own death, and during the life of his wife surviving him. In the absence, therefore, of any authority, and without any argument in support of the claim, I cannot make the order prayed."

The determination in *Stiffe v. Everitt* is an inevitable consequence of *Purdew v. Jackson*; and both stand upon the intelligible principle, that neither the husband alone, nor the husband and wife together, can bar her legal right by survivorship, where the chose in action is not only not reduced, but is incapable of being reduced into possession in the husband's lifetime.

To this test, however, it will be found difficult to

(m) A petition had been presented by the husband and wife, praying that a fund in which she had a life interest should be transferred to the husband absolutely, she consenting. She had joined in the petition, and

the question was, whether the Court would be justified in making the order prayed. Lord Cottenham thought not.

(n) 3 Rus. 65.

(o) 1 Rus. 71, n.

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Effect of a release.

*Hore v. Becher.*

reconcile *Hore v. Becher*, before Sir Lancelot Shadwell (*p*), where a single woman, being entitled to an annuity for her life, secured by bond, married; and her husband executed a release of the bond and died. Whereupon His Honour ruled, that the widow's claim to the future payments of the annuity for her life was barred by the husband's release. On citing *Stiffe v. Everitt*, the Vice-Chancellor remarked, "*That was a case of assignment.* There is a difference between an assignment and a release. The question there was, whether the husband could pass that right in a chose in action which should survive to the wife after the death of the husband. But here the question is, what is the effect of a release? It is material that the law should be clearly understood on this point. If anything is secured by bond or otherwise to a woman who afterwards marries, the husband may then release the security; and if he releases the security, there is an end of the annuity" (*q*).

The reasoning on which this case proceeds will, to plain minds, be hard to understand. For here is a disposal by the husband of the wife's interest beyond the coverture, although that interest was neither reduced into possession, nor in the nature of things capable of being reduced into possession in the husband's lifetime. The Vice-Chancellor of England draws a distinction between an assignment and a release, which does not appear to have entered into

(*p*) 12 Sim. 465; 6 Jur. 94; Law Jour. 11, N. S., 153.

(*q*) It is undoubted that an interest which cannot be assigned may be released. That is a safe general proposition; which may stand well with another general proposition, namely, that the husband cannot dispose of his wife's life interest beyond

the coverture. If, however, he can do so by release, the rule in *Purdew v. Jackson* and *Stiffe v. Everitt* will often, if not always, be got rid of. The policy of that rule may or may not be objectionable; but, after such a lapse of time, it cannot satisfactorily be upset by anything short of a decision of the last resort, or an act of parliament.



the mind of Sir Thomas Plumer in deciding *Purdew v. Jackson*, or into the mind of Lord Cottenham in deciding *Stiffe v. Everitt*. And even as regards a release, we have an ancient case in Moore, which determines, that "If the wife has an annuity for life, a release by the husband does not bind her if she survive" (r). So that on the whole it may perhaps be doubted whether the decision in *Hore v. Becher*, (even admitting it to be technically accurate,) does not stand upon a refinement, (I say it with reverence), too sublimated to govern safely the practical transactions of mankind. However, it may be supposed to have received something in the nature of a carefully balanced, and consequently equivocal, judicial sanction in *Ashby v. Ashby* (s), where Vice-Chancellor Knight Bruce, after deciding that the husband's assignment of his wife's chose in action was void against her surviving, observed,—“What would have been the effect upon the wife's rights if the husband had *bond fide*, for a valuable consideration, executed a deed of release of this legacy, *I do not say*.” As the point was not raised either by the circumstances or the argument in *Ashby v. Ashby*, this judicial remark must be considered a volunteer. So, I apprehend, must likewise be held another observation of the same learned Judge, in *Whitmarsh v. Robertson* (t), where a husband having *assigned* the dividends of a fund to which his wife was entitled for her life, the report states:—“As to the question, whether the wife surviving her husband would or would not be entitled to receive the annuity, His Honour (Vice-Chancellor Knight Bruce) declined to give any opinion.” Now this was the very question

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(r) 2 Moore, 522. See also Com. Dig., tit. Bar. & Fem. (F. 1), where the proposition is somewhat expanded, thus: “If the wife has an annuity for life, and the husband release to the grantor by deed, and

die, the wife shall have it; for the release of the husband discharges it only during the coverture, it being an estate for life.”

(s) 1 Coll. 553.

(t) 1 You. & Col. C. C. 715.

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decided by Lord Cottenham in *Stiffe v. Everitt*; so that, although the Vice-Chancellor "declined to give an opinion," we are bound to suppose that he *had* an opinion; and to conclude likewise (in the absence of proof to the contrary) that that opinion was in conformity with the Chancellor's decision (*u*).

Effects of the  
wife's consent in  
court.

The Court of Chancery has no authority to enable the husband, or the husband and wife together, to dispose of her reversionary choses in action, even although she were examined in court, and were to express her consent that the transfer should be made. Thus, in *Wade v. Saunders* (*x*), Sir Thomas Plumer, about a year after his decision in *Purdew v. Jackson*, refused to take the consent of a married woman to give up her reversionary interest, in part vested, and in part contingent, in a fund in court, in favour of a purchaser from her husband.

Box v. Jackson.

One would hardly have expected that this point would be raised again in the present day. But in a late case in Ireland it was deemed deserving of the gravest deliberation. That was in *Box v. Jackson* (*y*), where a fund stood settled upon trust for Edward Box for life, remainder to his wife for life, remainder to their children as Edward Box should appoint, and in default of appointment, to the children generally. There were issue of the marriage three daughters, one of whom married John Wilmot. Box died without exercising his power, so that the daughters stood entitled to the fund in equal shares, subject to their mother's life interest. The bill was filed by the mother, by the two unmarried daughters, and by Mr. and Mrs.

(*u*) Obiter dicta of judges are of value when they affirm anything, or deny anything; that is to say, when the judges *commit* themselves to a positive proposition: mere disclaimers of opinion, on the other hand, are

often dangerous; since they may be construed into doubts, where perhaps no doubts exist.

(*x*) Turn. & Russ. 306.

(*y*) Drury, 42.

Wilmot, praying that, pursuantly to a written consent, signed by Mr. and Mrs. Wilmot, and by the unmarried daughters, the trusts of the settlement might be declared to be at an end, and that the fund might be transferred to the mother, her daughter Mrs. Wilmot consenting to waive her rights. The question was, whether the Court could give effect to such consent, so as to bind her in case of her husband's predeceasing her before the property vested in possession. Lord Chancellor Sugden called in the aid of the Master of the Rolls in Ireland, who delivered his opinion, that the Court had no power to take a married woman's consent under such circumstances, to the effect of excluding her right by survivorship. The case had been in argument likened to that of a fine. His Honour pertinently observed that "the fine it was that bound her at common law. There her consent on examination before the judge has of itself no operation (z). The same law which gives her the property disables her from disposing of it." The Lord Chancellor agreeing with the Master of the Rolls, decided that the Court had no jurisdiction to do what the plaintiffs sought; and the bill therefore was dismissed (a).

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But although, where the interest of the wife continues reversionary throughout the coverture, no assignment by

Effect of an assignment of the prior interest to the reversioner  
femme couverte.

(z) This remark was anticipated by Sir William Grant in *Richards v. Chambers*, 10 Ves. 580, where he said, "It was not by the examination that the fine had its efficacy. The Court of Common Pleas could not by the consent of a married woman upon examination give effect to her conveyance by lease and release," &c. There is no analogy between a fine and a consent. The fine does everything. The consent puts the machine in motion.

(a) In *Woollands v. Crowcher*, 12 Ves. 174, Sir William Grant, with his wonted discrimination and felicity of expression, shews where the wife's consent will be received, and where not. "In this instance," said he, "the object is not to bar the wife's equity to have a settlement, but to bar her right of survivorship, for upon his death it belongs to her entirely. That is not the case in which the Court takes her consent. If the husband has a right to convey,

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the husband, or by the husband and wife together, will bar her survivorship, yet if the prior interest be assigned to the wife in the husband's lifetime, the husband may reduce the fund into possession, or may, by assigning it, enable his assignee to do so. This may be regarded as an important practical qualification of the doctrine in *Purdew v. Jackson*. Thus, in *Hall v. Hugonin* (b), where stock was standing in the name of trustees upon trust for A. for life, remainder to B., a married woman, A. assigned his life interest to B.; whereupon, B. consenting, Sir L. Shadwell ordered the fund to be transferred to her husband. In doing so, His Honour put the matter very clearly, saying—

Suppose that a father gives a sum of stock to a trustee for his daughter Elizabeth for life, remainder to his daughter Mary, a married woman, absolutely, and that immediately after his death Elizabeth assigns her life interest to Mary. Are not by that mere act both the life interest of her sister and her own interest in remainder vested in her? I do not put it as a case of *merger*, but I ask whether the married daughter has not both the interests? If then she has the whole interest, is it not an interest with which she is capable of dealing in this court as if it had been given to her absolutely. It seems to me that it is; and therefore, when the husband applies to the court to have the fund transferred, and his wife consents (c), the trustees will be entirely safe in making the transfer.

The like decision had been previously made by Sir L. Shadwell in *Creed v. Perry* (d), where the tenant for life of a trust fund having surrendered her interest to the reversioner, a married woman, and she having been ex-

let him exercise his right. But why this court should join and aid him for that purpose, I do not know." There is, therefore, nothing very new in *Box v. Jackson*, except a judicial suggestion thrown out that *Purdew v. Jackson* had overturned

the former law. If so, Sir William Grant misunderstood it.

(b) 14 Sim. 466; 10 Jur. 940.

(c) As to taking a wife's consent in such circumstances, see *infra*—"Wife's Equity to a Settlement."

(d) 14 Sim. 592.

mined in court and consenting, the Court ordered the fund to be transferred to her husband.

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The decree in this case was said to have been made on the authority of *Bean v. Sykes* (e), decided by Sir L. Shadwell on the 30th Nov., 1838. But it seems there was a still earlier precedent—that of *Lachlon v. Adams* (f), where a married lady being entitled to a reversionary interest in a fund in court, subject to a life interest in her mother, the latter surrendered her life interest to her daughter, upon which an application was made to the Vice-Chancellor for payment of the fund, partly to the married lady, and partly to her husband, on the ground that the interest was no longer reversionary, and His Honour made the order. After the Vice-Chancellor had risen, an application was made to the Lord Chancellor Cottenham to take the married lady's consent to the payment. His Lordship, observing that the life interest had merged, took her consent, and made the order (g).

The act of assignment, whether by the husband alone or by the husband and wife together, will not defeat the wife's title by survivorship, unless the assignee follow it up by actually reducing the fund into possession before the death of the husband. For the assignee's laches may keep the door open for the wife to come in by survivorship; as would appear to have been the case in *Hutchings v. Smith* (h), where a married woman being entitled to one-fifth of a residue, joined with her husband and the four other residuary legatees in filing a bill to have the testator's estate administered. Pending the suit, but before the rights of parties had been declared, the husband and wife joined in

Assignment  
valueless unless  
followed by reduc-  
tion into posses-  
sion.

(e) 2 Haye's Conveyancing, p. 640,  
5th edition.

91; and *Wilson v. Oldham*, Lewin on  
Trusts, p. 297.

(f) 14 Law J. 382.

(h) 9 Sim. 187.

(g) See also *Story v. Tonge*, 7 Beav.

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assigning the wife's share as a security for a debt due from the husband. But the assignee took no step in the cause to obtain the benefit of the assignment, and a decree was made, directing the share in question *to be transferred to the wife*. Sir Lancelot Shadwell, remarked that there was in the case a peculiarity, inasmuch as

Nothing had been done by the assignee to reduce the chose in action into possession; and there was an important difference between the case where the chose in action was fluctuating, and the case where there had been a decree directing that it should be paid to the wife who had survived her husband. It was very extraordinary that no petition was ever presented to the court by the assignee. The money must be paid to the wife.

Assignment in  
bankruptcy sub-  
ject to the same  
rule.

The assignment in bankruptcy does not bar the wife's right of survivorship, where the fund has not been reduced into possession in the husband's lifetime. Thus, in *Pierce v. Thornley* (i), the husband of a woman having a vested interest in possession in a legacy, having become bankrupt, his assignee filed a bill against the testator's executors to compel payment of the legacy. Soon afterwards the husband departed this life. In these circumstances it was held by Sir Lancelot Shadwell that the widow, and not the assignee, was entitled to the legacy (k).

Husband's  
assignees in  
bankruptcy can-  
not sue in their  
own names alone.

It was not long since decided by the Court of Exchequer that the assignees of a bankrupt might maintain an action in their own names alone, for a chose in action belonging to the wife before marriage, as a promissory note given to her *dum sola*; and that in such action the defendant could not set off a debt due to him from the bankrupt (l). This decision proceeded as to the first point (the right of suing)

(i) 2 Sim. 167.

fully studied. It is very able.

(k) The Vice-Chancellor's judgment in this case ought to be care-

(l) *Yates v. Skerrington*, 11 Mee. & Wel. 42.

on the authority of a case in *Peere Williams* (m). The Chief Baron (Lord Abinger) in delivering the judgment of the Court, said—"The case cited is a precise authority that the assignees are entitled to enforce the recovery of this chose in action in their own names. And if they can sue in their own names, it is clear that a set-off cannot be enforced against them for any claim in respect of a debt due from the husband. That has been settled in several cases; and indeed was not disputed in the argument." But this decision has recently been reversed by the Court of Exchequer Chamber, who have determined "that the assignees of a bankrupt cannot maintain an action in their own names alone, on a promissory note made to the wife of the bankrupt before her marriage" (n).

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(m) *Miles v. Williams*, 1 P. Williams, 249.

(n) *Skerrington v. Yates*, 12 Mee. & Wel. 855.

## SECTION IV.

WIFE'S EQUITY  
TO A SETTLE-  
MENT.

## THE WIFE'S EQUITY TO A SETTLEMENT.

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WE have already seen (s), that the law of England

(s) *Supra*, p. 42.



furnishes no direct method whereby a husband can be compelled to maintain his wife, either suitably to his own means, or to the fortune she may have brought him (t).

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TO A SETTLE-  
MENT.

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Equity, however, has done much to mitigate the asperity of the law. It has not indeed attempted to compel maintenance to the wife out of the husband's means, or even out of the wife's own means, where these are legally in the husband's power. But wherever the husband is obliged to seek the aid of equity in order to get the benefit of his wife's property, the assistance of the Court is withheld until a provision for the wife is secured, if she requires it. And this is called her equity to a settlement; of which Lord Cottenham said, in *Sturgis v. Champneys* (u), that "upon a careful examination of the authorities, he had not found the time in which the Court did not exercise this jurisdiction in favour of the wife."

Where the interest claimed by the husband in right of his wife is merely equitable (v), or where, though in its nature legal, it becomes from collateral circumstances the subject of a suit in equity (w), the wife (if otherwise unprovided for, or if inadequately provided for) has a right to a provision out of the fund; and when a settlement is made upon her under the sanction of the Court, the rule, as will be seen more fully hereafter, is to include in its provisions the children of the marriage.

When this equity  
arises.

According to former opinions, it was only where the

(t) In Sir George Mackenzie's Institutions of the Law of Scotland, published nearly two centuries ago, there is a passage which I cite with satisfaction, as a proof, in one respect, of superior civilisation. "The husband," says that remarkable and justly celebrated person, "is obliged to aliment his wife; and if he refuse, the Privy Council or Lords of Ses-

sion will appoint an aliment to her, out of her husband's means, suitable to his quality."

(u) 5 Myl. & Cra. 103.

(v) As where, for example, it is vested in trustees who have the legal estate, the wife, or rather the husband in her right, having only the equitable or beneficial interest.

(w) 1 Rep. 258.

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The wife may as-  
sert her claim as  
plaintiff.

Amount which  
will be settled.

husband appeared as a plaintiff seeking aid from the Court, that the equity came into action. But it is now well settled, that the wife herself may, without waiting for any proceeding on the husband's part, assert her right to a settlement, by a substantive proceeding, instituted against her husband for that sole purpose, through the instrumentality of her next friend (*x*).

There is a practice, but no imperative rule, as to the amount to be settled. Most frequently *one-half* of the fund is tied up (*y*); but the proportion in each case depends on all the circumstances; and in fixing it, any previous settlement which may have been made, or any property of the wife's which may have been previously possessed by the husband, will be taken into consideration (*z*). The amount therefore is discretionary in the Court; and as Sir L. Shadwell has remarked, "the discretion which it is clear from the cases the Court has, would be one not much worth having, if in every case it was to be exercised by giving a moiety to the husband, and a moiety to the wife."

Accordingly, in *Coster v. Coster* (*a*), a husband having without sufficient cause separated from his wife, leaving her unprovided for, *three-fourths* of a fund in court, arising from property bequeathed to her, was by Sir L. Shadwell ordered to be settled on her and her issue; the remaining fourth to be paid her husband.

In *Brett v. Greenwell* (*b*), where the husband had taken the benefit of the Insolvent Debtors' Act, the whole amount of a fund in court belonging to a married woman, was by Baron Alderson ordered to be secured for the benefit of

(*x*) *Elibank v. Montelieu*, 5 Ves. 737.

(*y*) *Jewson v. Moulson*, 2 Atk. 423.  
1 Rep. 260, and cases there cited.

(*z*) *Green v. Otte*, 1 Sim. & St. 250.

(*a*) 9 Sim. 597.

(*b*) 3 You. & Coll. Ex. 230.

herself and her children. In this case the attention of the learned Judge was specially directed to *Beresford v. Hobson* (c), where Sir Thomas Plumer had come to the conclusion that the Court never gave the *whole* to the wife. The Court, however, has done this; for in *Coster v. Coster* (d), Sir L. Shadwell, having looked into the matter very carefully, states, that "it certainly was done in the case of *Jacobs v. Amyatt* (e); but with that exception he took it to be generally true, that the Court never gave the whole of the property to the wife; although in a case of desertion by the husband, or of inability to support her, the Court would order the whole of the *income* to be paid to her by way of maintenance (f).

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In *Napier v. Napier* (g), before Lord Chancellor Sugden, a fund in court (1000*l.*), belonging to a married woman whose husband had been discharged as an insolvent, was ordered to be thus appropriated; viz., 600*l.* to the wife and children; and 400*l.* to the assignee for the benefit of the creditors; the Court declining to follow the precedent made by Baron Alderson in *Brett v. Greenwell*. In *Ex parte Thompson* (h), the Court of Review held that the wife of a bankrupt had a right to a provision out of the property which she had brought her husband on the marriage. But an allowance of 200*l.* a year out of a neat annual income of 225*l.* was deemed excessive, and was consequently reduced to 175*l.* a year.

Every case, however, must be governed by its own circumstances. Thus in the last case on the subject,

(c) 1 Mad. 362.

(d) 9 Sim. 597.

(e) 1 Mad. 376, note.

(f) See *infra*, "Orders for wife's separate maintenance."

(g) 1 Dru. & War. 407.

(h) 1 Deac. Bank. Cases, 90. The Court of Review in this case held that it had jurisdiction on petition in bankruptcy to order the assignees to make such provision for a wife, whether the property consisted of real or personal estate.

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Where the wife  
has but a life es-  
tate.

*Gardner v. Marshall* (i), where a husband had had large advances made to him by his wife's father, and had had the benefit of a provision made for his wife by his father's will, and afterwards became bankrupt,—it was held by the Vice-Chancellor of England, that the wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life for her separate use without power of anticipation; His Honour, in making his decree, saying, "If there be no precedent for this, I will make one" (k).

In *Elliott v. Cordell* (l), Sir John Leach decided that where a legacy of stock to a married woman was only for her life, and where she and her husband had joined in a sale of it, the purchaser was not compellable to allow the wife the benefit of a settlement. This decision proceeded on a distinction drawn between the case of "an absolute equitable interest given to the wife," and the case of "an equitable interest given to her for life only;" and had its foundation in some such reasoning as this, namely, that while the husband supports his wife, he may dispose of her life interest to a bona fide purchaser for valuable consideration, who in such a case will not be subject to her claim for a settlement. But Sir John Leach said that "if the husband deserted his wife, or failed to perform the obligation of maintaining her, the Court would apply any equitable interest which he retained for the life of the wife either wholly or in part for the maintenance of the wife; and if the husband became bankrupt, or took the benefit of the Insolvent Debtors' Act, the Court would fasten the same obligation upon the general assignee; but the same principle did not necessarily apply to a

(i) 14 Sim. 575.

(k) It has always been usual to have regard to the amount of the wife's fortune appropriated by the

husband. *Bond v. Simmons*, 3 Atk. 20; *Green v. Otte*, 1 Sim. & Stu. 250.

(l) 5 Mad. 149.

particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife."

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It may be observed, in passing, that the sale of the wife's life interest, although held good in *Elliott v. Cordell*, would perhaps not now be so considered; because *Stiffe v. Everitt* (p) has settled that the interest of the wife beyond the coverture is inalienable. The reasoning, moreover, of Sir John Leach is not marked by his wonted perspicuity; but the distinction which he somewhat doubtfully (q) draws between the case of a general, and that of a particular assignee, has, it must be owned, been sanctioned in *Stanton v. Hall* (r), by Lord Chancellor Brougham, who, however, appears to have regretted that the equity to a settlement should have been allowed in any case against a bona fide particular assignee. Had the question been open, Lord Brougham would evidently have rejected the wife's claim in such a case, whether her interest in the fund was absolute or for life. But in *Stanton v. Hall*, he had only to consider a married woman's claim where an annuity was made payable to her, not for her own life, but during her husband's life. And upon the principle, that the husband, by maintaining his wife, becomes, as it were, a purchaser of any interest secured to her for her own life, or for the life of her husband, Lord Brougham held that the point was governed by the decision of Sir John Leach in *Elliott v. Cordell*, and decreed that a particular assignee for value was not bound to make any provision for the wife (s).

Or an interest secured to her for her husband's life.

(p) 1 Myl. & Cr. 87.

(q) His language in the report betrays more than hesitation.

(r) 2 Rus. & Myl. 175.

(s) See *Lumb v. Milnes*, 5 Ves.

517; also same case noticed in a note to the report of *Stanton v. Hall*, 2 Rus. & Myl. 182, where likewise are cited *Brown v. Clarke*, 3 Ves. 166, and *Jacobs v. Amyatt*, 1 Mad. 376, n.

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When the equity is allowed out of her life interest as against a particular assignee.

Against a general assignee.

As against the husband himself.

Wife may consent

But even in the case of a particular assignee for value, if the husband, at the time of the assignment of his wife's life interest, was not maintaining her, the equity for a settlement will hold. If, on the other hand, the husband *was* maintaining her at the time of the assignment, but afterwards failed in the performance of that duty, the equity (as I understand *Elliott v. Cordell* and *Stanton v. Hall*) will not *hold*; because the assignee, who became a purchaser bonâ fide when the husband and wife were living together, ought not to suffer on account of any subsequent difference arising between the married parties.

When, indeed, the husband becomes bankrupt, or takes the benefit of the Insolvent Debtors' Act, his general or official assignee must allow the wife's equity; because, in such a case, the husband's inability to maintain her is established *rebus ipsis et factis*. And accordingly, in *Sturgis v. Champneys* (t) the equity was enforced out of the wife's life estate against an official assignee, apparently without objection on that head, although other points in the case were disputed.

But when the question is with the husband himself, it would seem that the allowance of the equity will turn upon the fact, whether he is or is not adequately maintaining his wife at the time of her demand.

I have humbly endeavoured to make the distinctions taken in *Elliott v. Cordell* intelligible. To make them rational is not my province. But it may be well to consider whether the scope of Lord Cottenham's reasoning in *Sturgis v. Champneys*, does not go to overrule both *Elliott v. Cordell* and *Stanton v. Hall*.

As before observed (u), the Court will not act upon a

(t) 5 Myl. & Cr. 97.

(u) *Supra*, p. 62; and see p. 63, note (a), where Sir W. Grant explains

the distinction between waiving survivorship, and waiving an equity to a settlement.

married woman's surrender of her survivorship; because that is her legal right, which, during the coverture, cannot be departed with. But her equity to a settlement is not a legal right, but a creature of the Court of Chancery, which allows it to be waived by the wife, for whose sole benefit it has been established. When, therefore, the wife consents to a transfer of the fund, she is held to have waived her equity to a settlement. But her consent must be formally taken upon her examination in court, apart from her husband, or under commission issuing from the court (x).

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to waive her  
equity.

How her consent  
is taken.

The Court, however, will not take the consent of an infant feme covert (y). And in a case where the wife was a ward of Chancery, and the husband, after being committed for a contempt in marrying her, was liberated on undertaking to make a specified settlement, the Court would not afterwards allow the wife to waive it (z).

The Court will  
not take the con-  
sent of an infant  
feme covert.  
Case of a female  
ward of court.

Where the wife's consent has been already given upon her examination before another competent tribunal, she need not, it would appear, be examined again in Chancery (a).

Where wife's con-  
sent has been al-  
ready taken.

Where the sum belonging to the wife is under 200*l.* (b), the practice of the Court has been to dispense with the wife's consent, and to order the amount to be paid at once to the husband, on its being made to appear that it is not affected by any settlement or agreement for a settlement. Sir John Leach acted with evident hesitation, if not

Where the sum is  
under 200*l.*

(x) 1 Dan. Cha. Prac. 95, Headlam's Edition. Seton on Decrees, 255, 256.

(y) *Abraham v. Newcombe*, 12 Sim. 566, overruling *Gullin v. Gullin*, 7 Sim. 236.

(z) *Stackpoole v. Beaumont*, 3 Ves. 89.

(a) *Campbell v. French*, 3 Ves. 321. *May v. Roper*, 4 Sim. 360.

(b) The standard in Lord Thurlow's time was 100*l.*; *Bourdillon v. Adair*, 3 Bro. C. C. 237. In Lord Loughborough's it had become 200*l.* *Elibank v. Montolieu*, 5 Ves. 742, n.

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Where the pro-  
duce is under 10l.  
a-year.

Lord Erskine's  
general order.

Consent will not  
be taken till the  
amount of the  
fund has been  
ascertained.

reluctance, on this rule in *Foden v. Finney* (c), where he ordered a sum of 83l. 8s. 9d. stock, being a wife's share of a fund in court, to be paid to her husband, although the wife had been deserted by him, and opposed the application.

Mr. Daniell, in his book on Chancery Practice (d), says, the consent of the wife will in like manner be dispensed with where "the sum produces less than 10l. a year;" but the case he refers to, as an authority for this position, *Ellworthy v. Wickstead* (e), does not warrant it.

On the 16th February, 1806, a general order (f) was made by Lord Chancellor Erskine, directing that if any unmarried woman, to whom any sum under 200l. principal, or 10l. a year, had been ordered to be paid, should marry before receipt of the money, the Accountant-General, upon an affidavit that there was no settlement affecting it, should give a draft for the amount, payable to the woman or her husband (g).

While the amount of the fund is unascertained, the court will not accept the wife's consent; because the amount is so material an element for her consideration,

(c) 4 Rus. 428. See also *Ellworthy v. Wickstead*, 1 Jac. & Walk. 69. It may be doubted whether a rule of practice, which does not seem very rational in itself, has not been displaced or shaken by *Brett v. Greenwell*, 3 You. & Col. Ex. Rep. 230, and *Bailey v. Dennett*, 3 You. & Col. Ex. Rep. 459. But see *Napier v. Napier*, 1 Drur. & War. 407. Vice-Chancellor Wigram appears to recognise the rule in *Lloyd v. Mason*, 5 Hare, 149. To many a wife deserted by her husband, 199l. might be the means of securing a useful provision; but by force of this rule, her husband, upon showing that there was no settlement or agreement for a settlement, might insist on having the

money paid to him, although his wife was not only abandoned by him, but starving.

(d) Vol. I., p. 96.

(e) 1 Jac. & Walk. 69.

(f) Beame's Orders, 464.

(g) The order is of wonderful complexity; but the above seems the meaning. However, to prevent mistakes, I subjoin a copy. "This court doth order, that in the execution of the several orders of this court now made, or hereafter to be made, in which this court shall have directed, or may hereafter direct, any sum or sums of money to be paid to any unmarried woman or women, or where, by the report or reports now made or hereafter to be



that she ought to be precisely informed of it before being allowed to conclude herself. Thus, in *Sperling v. Rochfort* (h), Lord Eldon said, that till the Court could state the precise sum to be passed away, "it would not address to the wife any question, or speculate upon what might be her inclination." This seems scarcely to apply where a known fund is merely liable to diminution; as, for example, where costs are to be paid out of it. And in such a case, as I understand the report, Vice-Chancellor Knight Bruce took the wife's consent (i).

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If a married woman, on being examined apart from her husband, refuses to give her consent, a reference will be made to one of the Masters of the court to approve of a proper settlement to be made upon her and her children; unless the facts are so completely before the court as to induce it to make the order at once without sending the matter to the Master (j).

Consequence of  
wife's refusal to  
waive her equity.

made by any person or persons who hath or have been or now is or are or may hereafter be a master or masters of this court, any sum or sums of money now is or are or hereafter may be reported due to any unmarried woman or women, and in any of which cases it shall happen that any such woman or women shall be married before such sum or sums of money, or any of them, shall be paid to her or them respectively to whom the same is or are directed to be paid or reported to be due; the Accountant-General of this court shall, in all cases where the sum or sums of money so directed to be paid or so reported to be due and unpaid as aforesaid do not amount in the whole to the sum of 200*l.* in principal money, or to the sum of 10*l.* in annual payment, upon

an affidavit being made by any such woman or women, and her or their husband or husbands respectively, stating her or their marriage or respective marriages, and that no settlement or agreement for a settlement had been made affecting or relating to such sum or sums, draw a draft or drafts for such principal money not amounting to the sum of 200*l.*, or for such annual payment not amounting to the said sum of 10*l.*, and make the same draft or drafts payable to such woman or women, or her or their husband or husbands respectively for such said sum or sums respectively."

(h) 8 Ves. 180.

(i) *Packer v. Packer*, 1 Coll. 91.

(j) *Coster v. Coster*, 9 Sim. 604.  
*Napier v. Napier*, 1 Drur. & W. 407.  
1 Dan. Cha. Prac. 101, Headlam's Ed.

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Necessity of showing that the fund is not affected by settlement.

This much of the wife's consent to waive her equity. A word or two must be said of the evidence which the Court requires in all cases, whatever may be the amount of the fund, to show that it is not tied up by a settlement or agreement for a settlement. In *Rose v. Rolls*(*k*) it was held by Lord Langdale, that on an application for payment out of court of money belonging to a feme covert, it must either appear that there has been no settlement or agreement for a settlement; or, if any settlement exist, it must be produced, to enable the Court to judge whether it affects the fund in question. It is not sufficient to make affidavit that the particular fund is not the subject of any settlement. "If," said his Lordship, "any settlement existed, the petitioners were not competent judges of its effect. Many instances had occurred in which parties had by affidavit represented that a settlement did not affect the property in question, yet on inspection of the settlement it turned out to be quite the reverse."

In a very recent case on this point, *Britten v. Britten* (*l*), the same eminent judge decided that an affidavit simply that the fund is not settled is insufficient. It must be shown either that there is no settlement, or what the settlement is. In so ruling, Lord Langdale observed:

Case mentioned  
by Lord Langdale.

Experience has shown the utility of that rule. An instance occurred in this court, where, upon the occasion of a large trust fund becoming divisible, applications were made for payment of four several sums of 10,000*l.* each to the husbands of married women on affidavits that those sums respectively had not been settled. I refused to make the orders; and afterwards, on production of the settlements, it was found that every one of them included the large sums thus improperly asked to be paid to the husbands (*m*).

(*k*) 1 Beav. 270.

(*l*) 9 Beav. 143.

(*m*) Mr. Beavan adds the following useful note. "The proceedings of the court are so frequently im-

peded by the production of informal affidavits on this point, that I venture to recommend the following forms of affidavit to be made by the husband and wife, which I believe

An order for payment out of court of money the property of a married woman cannot generally be obtained by decree at the hearing; but a petition for that purpose must be presented, which may come on to be heard either together with the cause on further directions; or, with more propriety, may be presented after the decree has been made and the fund thereby carried over to the account of the husband and wife (n).

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There must be a petition for payment of money out of court.

Where the marriage has been entered into under a foreign law, the parties not having the law of England in their contemplation—the equity to a settlement does not arise; that equity being indigenous to the law of England. For where a contract is made between persons domiciled in a foreign country, and in a form known to the laws of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it. If, therefore, a domiciled Scotchman would in Scotland be held entitled, by virtue of a marriage contract executed there and in the Scotch form, to receive whatever property accrued during coverture to his wife, the Court of Chancery would enforce his right as against any such property coming within its jurisdiction; and

Where the parties marrying had a foreign law in contemplation.

will be considered satisfactory in the various branches of the court.

*Form of affidavit of no settlement.*

FIRST. "That no settlement nor agreement for settlement was made, entered into, or executed previous to or upon or since the marriage of us the said deponents."

*Form of affidavit of settlement not affecting the fund.*

SECOND. "That no settlement, &c., (as before) except the settlement now produced, &c., and marked A. And we further make oath and say

we believe that such settlement in no way affects the sum of £ — mentioned in the petition lately presented by us in the above-mentioned cause, and which is thereby sought to be obtained out of court."

When the settlement is produced, the ordinary course at the Rolls is for counsel to state that he has read it, and that it does not affect the fund in question. The court usually acts on that assurance.

(n) 1 Daniell's Cha. Prac. 100, Headlam's Edition; *Campbell v. Hardinge*, 6 Sim. 283.

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would not, in opposition to the provisions of the contract, raise an equity for a settlement in favour of the wife (*o*). The decision of this point by Lord Brougham has been adverted to by Lord Cottenham in the following terms :—

It was decided, and most properly decided, by Lord Brougham in *Anstruther v. Adair*, that the settlement being executed in Scotland between Scotch parties, it must be dealt with according to the law of Scotland ; and that you cannot apply the equities of the English law, between parties living in Scotland, and who never had those equities in their contemplation (*p*).

But I apprehend the same consequences would not follow in the case of a Gretna Green marriage by parties having an English domicile, because they go to Scotland merely to be united ; but for everything beyond the fact of matrimony, they must be supposed to have the law of England “in their contemplation.”

In the case of *Sawyer v. Shute* (*q*), where the husband and wife were apparently both domiciled in Prussia, the Deputy Remembrancer of the Court of Exchequer reported a sum as due to the wife. Upon a reference to the Master, it appeared that by the laws of Prussia all personalty accruing to the wife during the coverture vested absolutely in the husband ; to whom accordingly the Court ordered the whole fund to be paid. This case scarcely warrants the doctrine stated in *Roper* (*r*), that “when the wife is the *subject* of a foreign state, by the law of which her husband would be entitled to receive the *whole* of her property without making any provision for her, the Court will dispense with a settlement.” But in a case in Mr. Jacob's Reports (*s*) the point is thus put. “The parties

(*o*) *Anstruther v. Adair*, 2 Myl. & Kee. 513.

(*p*) *Marquis of Breadalban v. Marquis of Chandos*, 2 Myl. & Cr. 738.

(*q*) 1 Anstr. 63.

(*r*) 1 Rep. 265.

(*s*) *Dues v. Smith*, Jac. p. 544.

were *subjects* of Denmark, and an affidavit was produced, stating that by the Danish law the husband was entitled to receive the property of his wife without making a settlement upon her." The Master of the Rolls (Sir Thomas Plumer) ordered the whole to be paid to the husband. For aught appearing in this report, the parties might, or might not, have had their domicile in Denmark. The case is rested on the circumstance of their being subjects of—that is, owing allegiance to—the Crown of Denmark. Now, allegiance and domicile are things independent of each other. And if we suppose two subjects of France coming hither *animo remanendi*, acquiring an English domicile, and then intermarrying—the wife, although still a subject of France, would by reason of this adoption of an English domicile, be entitled to a provision out of her equitable chose in action. The question, therefore, does not appear to turn on allegiance, but on domicile; and on domicile, as evidencing intention, of which the accidental fact of allegiance gives no indication.

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This view of the matter is strongly confirmed by the recent case of *Duncan v. Campbell* (t) where Sir L. Shadwell held that a deed made between parties, some of whom were domiciled in Scotland, and some in England, was to be construed so far as it concerned the Scotch parties according to Scotch law; and so far as it concerned the English parties, according to English law. All the parties were apparently Scotch by origin, and before the union would have been subjects of the Scottish Crown. But inasmuch as certain of them had relinquished their Scotch domicile, and adopted an English domicile, they were in the transaction in question held to have the English, and not the Scotch, law in their contemplation.

(t) 12 Sim. 616.

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The equity is personal to the wife; but, when allowed, the children are included in the settlement.

The children of the marriage have no inherent equity to a settlement; but when a settlement is made under the direction of the Court, their interests are included. If, however, the wife die without having taken the necessary steps to secure a settlement, her children have no claim; for they can get nothing except through her instrumentality. Something therefore must have been done by her to show that her equity was claimed in her lifetime; and if this appear, it will enure to the benefit of her children. A decree or order for a settlement is always held sufficient for this purpose; but the mere filing of a bill in an administration suit, in which a married woman being a legatee is one of the defendants, will not have the effect of making her equity to a settlement attach, so as that upon her death the children may claim. This was decided in *De La Garde v. Lempriere* (t), in which Lord Langdale made the following instructive remarks:—

Remarks of Lord Langdale.

I conceive it to be settled that if there be a decree for a settlement upon the wife, the children are entitled to the benefit of it; although the wife may have died before any proposal for a settlement was carried before the Master. In this case the wife filed no bill claiming a settlement, and she died before any order for a settlement was made. In *Scriven v. Tapley* (u) the child after the death of her mother filed a bill for a settlement; and it was decreed by Sir Thomas Clarke at the Rolls; but, as to that part, the decree was reversed by Lord Northington. And in the case of *Lloyd v. Williams* (x), Sir Thomas Plumer, after a careful examination of all the authorities, said that no case had trenched upon *Scriven v. Tapley*. This case, therefore, would be very clear if it were not for the case of *Steinmetz v. Halshin* (y). But that case stands alone; and appears to me contrary to the previously existing rules on this subject. In all cases the equity of the

(t) 6 Beav. 344.

(u) Ambl. 509; 2 Eden. 337.

(x) 1 Mad. 464.

(y) 1 Glyn & J. 64. In this case

it was decided that the children's right attached on the mere institution of a suit relating to the trust fund.

wife is personal ; and it arises upon the vesting of the legacy in her. It may be defeated by a voluntary payment of the executors to her husband, who has a legal right to receive it and give a discharge for it. If the payment is to be made through the medium of the court, her equity will be enforced if she desires it, but not otherwise. She may abandon it ; in which case her children can claim nothing. Her equity and the equity of the children are treated as one equity, to be enforced or not, at her option. It is true that after the filing of the bill the discretion which the trustee or executor had to pay the wife's legacy to the husband is greatly altered. The filing of the bill has, it is said, made the court the trustee ; and if the wife be living, the court will not pay her legacy to her husband if she desires a settlement, or unless she waives it ; but when death has made any option on her part impossible—when nothing has occurred from which it can be concluded that she *has* made an option,—there seems to be no reason why the legal right of the husband should not prevail.

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But although the proceedings of the wife may be said to generate the children's claim, she cannot waive it when once it has accrued ; for, as Lord Hardwicke said, in an anonymous case reported in Vesey, senior (z), "The wife may give up her own interest, but no one can consent for the children."

When the equity has accrued, the wife cannot by waiving it defeat the children's claim.

Thus, if a decree or order be obtained in the wife's lifetime, to lay proposals before the Master for a settlement, and the wife at that stage dies, the children (being always included in such settlements) will have acquired a right to prosecute their claim (a) ; and their mode of proceeding will be by supplemental bill (b).

In a recent case (c) a married woman entitled to a legacy, appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband being bankrupt, his

(z) 2 Dick. 604.

(b) *Rowe v. Jackson*, 13 Ves. 1.

(a) Vol. ii., 672.

(c) *Lloyd v. Mason*, 5 Hare, 149.

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assignee sold his interest in the legacy. The solicitors for the purchasers and the wife, however, agreed to refer her claim to their counsel, who determined that she ought to have a moiety of the fund, subject to costs. But before any further steps were taken she died, leaving children. Vice-Chancellor Wigram held, that by what had been done while the wife was alive, a right had accrued by which the parties were bound; and consequently that upon the death of the wife the children were entitled to the portion which was to have been settled.

In another recent case, a married woman established her right to a settlement against her husband's assignees, to the extent of one-half of the fund; and it was held by Lord Langdale that she could not afterwards waive the making of the settlement so as to defeat the rights of her children (*d*).

A decree for a settlement always contemplates the interests of the children.

A decree or order for a settlement, in fact, always contemplates the interests of the children as well as those of the wife; and if, by any slip, it should omit express mention of the children, they will not be allowed to suffer on that account. Thus, by the decree in *Groves v. Clarke* (*e*), it was referred to the Master to approve of a settlement to be made on a married woman, without more. No question had been raised at the hearing, as to her children; and before any proposals were laid before the Master, she died. It was held by Lord Langdale that the decree, though silent as to children, enured for their benefit.

In this case, his Lordship expressed his concurrence

(*d*) *Whittem v. Sawyer*, 1 Bea. 593. The report is simply, that "it was arranged that half the fund should be conceded by the assignees." Lord Langdale "thought that the agreement enured for the

benefit of the children of the marriage;" adhering afterwards to this opinion, notwithstanding he had had his attention directed to *Barker v. Lea*, 6 Mad. 330.

(*e*) 1 Keen, 132.



with the opinion delivered by Sir Thomas Plumer, M. R., in *Johnson v. Johnson* (f), that it was "the constant rule of the Court to embrace the interest of the children in all such decrees." But where the children have been omitted in the settlement directed by the Court, the omission, if it has been long acquiesced in, will not be supplied after the wife's death (g).

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Some of these decisions may seem, at first, not easy to reconcile with *Fenner v. Taylor* (h), a case in which Lord Chancellor Brougham, reversing a decision of Sir John Leach, held that where a husband had signed a memorandum after marriage, agreeing to secure half his wife's property (consisting of a fund in court) to herself, it was competent for her to waive this agreement; and that any benefit which her children might have taken under it, was defeated by such waiver. But there were circumstances in that case deserving of particular attention; for, in the first place, it was contended that the agreement was voluntary; and secondly, the precise question had been previously decided by Sir W. Grant upon this very memorandum; for on the 8th of July, 1813, that eminent judge had ordered a legacy of 3000*l.* belonging to the wife, to be paid to her husband upon an affidavit stating that there was no settlement, or agreement for a settlement, unless this memorandum were to be considered such. Lord Brougham appears simply to have followed in the wake of Sir W. Grant. But on the case coming again before Sir John Leach, upon a petition for another portion of the same fund, His Honour, after expressing his compliance with the Lord Chancellor's decision, stated:—

Case of *Fenner v.*  
*Taylor.*

That the reasons on which he had formerly come to a different opinion,

(f) 1 Jac. & W. 475.

W. 479.

(g) *Johnson v. Johnson*, 1 Jac. &

(h) 2 Rus. & Myl. 190.

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(to which he still felt disposed to adhere,) appeared to him to be of considerable weight, and he thought it his duty to re-state them. In his view of the case, as the particular form of the settlement was not specified in the memorandum, a court of equity, if it were called upon to execute the agreement, would direct a settlement to be made in the ordinary form of marriage settlements, and the children, consequently, would be entitled to a benefit conformable to the usual course in such settlements. Although the Lord Chancellor and Sir W. Grant appeared to have considered that the agreement here was merely voluntary, it amounted, as it seemed to him, to a purchase by the husband of the wife's equity to a settlement, and therefore could not be regarded as a merely voluntary instrument. He had found a case exactly in point, *Blois v. Lady Hereford* (i), where it was expressly laid down, that under such circumstances a husband was a purchaser of his wife's equity.

In *Lloyd v. Williams* (k), a married woman was entitled to a legacy. Her husband being bankrupt, his assignees entered into an agreement with the executor to take only a part of the legacy, and a settlement was to be made of the residue on the wife and her children. No settlement, however, was made. The wife died. Sir Thomas Plumer held, that, under these circumstances, the right of the children had become effective.

Where some of  
the children are  
otherwise pro-  
vided for.

Where some of the children are otherwise provided for, the terms of the settlement may be varied in respect of them; but it does not follow that they are to be altogether shut out. Thus, in *Grove v. Clarke* (l), Lord Langdale observed—

If it appeared that one of the children was provided for, he would not say that that circumstance might not affect the terms of the settlement as to that child; but not that he was to be excluded.

Where there are  
no children nor  
prospects of any.

In a case where there were no children of the marriage, and the wife was in her sixtieth year—where she had

(i) 2 Vern. 501.

(k) 1 Mad. 450.

(l) 1 Keen, 132.

indeed for years been living apart from her husband, but subject to no imputation of incontinence, having left him in consequence of "unhappy differences and incompatibility of tempers and habits" (m); where it appeared, moreover, that in this state of separation she had, without receiving any aid from her husband, meritoriously supported herself by keeping a school; where, in addition to all this, it was shown that "her health had lately failed, that the number of her pupils had decreased, and that she consequently had not the means of maintaining herself" (m); the Court, taking all these circumstances into consideration, and having regard to the fact that "the husband had received divers considerable sums of money in her right" (m), held that she was entitled to have a certain sum of stock which had become payable to her, "divided, and paid, as to one moiety thereof, to the wife, for her separate use, upon her sole receipt" (n).

A wife who leaves her husband without sufficient cause not entitled to this equity:

I have set out the particulars of this case more fully than they appear in Mr. Simons's report (o); because it is not to be assumed that a wife who leaves her husband on the frivolous ground of "incompatibility of temper and habits," or the vague and indefinite one of "unhappy differences," (phrases which, in courts of justice, mean nothing), is entitled, as matter of right, to claim the benefit of the equity now under consideration. That equity is not dispensed upon the principle of encouraging the separation of married parties. On the contrary, the fact of separation throws upon the wife the burden of showing that she has been deserted by her husband, or that he is unable to maintain her, or that his misconduct has compelled her to quit him. Harshness

(m) The terms of the Master's Report, which was confirmed.  
Report.

(o) *Eedes v. Eedes*, 11 Sim. 569.

(n) The terms of the Master's

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in the husband, austerity of temper, rudeness of language, sallies of passion, are things to be borne by the wife; and if she separate without other and better causes, the Court will not allow to her alone that which the law intends for the support of both the spouses. It will not, in such a case, give the income to the wife, although the fund may perhaps be settled on the wife and the children; for, as to "unhappy differences," and "incompatibility of temper," in the marriage state, Sir William Scott makes some remarks, which would not be out of place in a court of equity. "When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, might have been, at this moment, living in a state of the most licentious and unreserved immorality" (p).

Now, it is true that in *Eedes v. Eedes* it did not appear that the husband had deserted his wife, or that he was unable to maintain her, or that his misconduct had compelled her to quit him. But there was a concatenation of other strong circumstances in the case, upon a special view of which the Court seems to have proceeded rather than on the foundation of any general rule.

There will be occasion to touch upon this matter again, and to cite some additional authorities, when we come to

consider the practice of courts of equity upon applications by the wife for separate maintenance, (without settlement), where she is forced to live apart from her husband (g).

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It need scarcely be said that the wife's adultery bars her equity to a settlement (r), unless she be a ward of court, married without its consent; in which case a settlement will be decreed, because the husband (whatever may be the measure of his wife's misconduct) appears himself before the court in the attitude of a delinquent (s).

Wife's adultery.

I have purposely reserved, for the close of this section, some remarks upon the case of Sir Edward Turner, determined by the House of Lords, in 1680, and often cited, as decisive of a question which has of late been the subject of much professional discussion, namely, whether the equity of a wife to a settlement, or to maintenance, can be enforced, where the subject-matter of litigation consists of a term in realty. If, in such a case, the wife's title be legal, she has undoubtedly no claim; for the husband may assert his rights at law; and at law the equity of the wife does not arise. On the other hand, if her title be *equitable*, the rule, it is said, ought to be the same; for in dealing with estates in land, equity, to preserve uniformity, follows the law. Thus, a term of years settled upon trust for the wife, without anything to show that it is intended for her separate use, is held to be in the husband's power as if it were a legal term; so that if the husband assign it, the assignee is entitled to call for the legal estate, and a court of equity will assist him to get it in. But the disputed question remains—whether equity will do so, without securing, out of the estate, a provision for the wife. Sir

Whether this  
equity can arise  
out of a trust  
term.

Sir Edward  
Turner's case.

(g) See "Orders for Wife's Separate Maintenance," next section.

Jun. 191. *Waikyns v. Waikyns*, 2 Atk. 97.

(r) *Carr v. Eastabrooke*, 14 Ves. 146. *Ball v. Montgomery*, 2 Ves.

(s) *Ball v. Courtis*, 1 Ves. & Bea. 302.

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Edward Turner's case is generally supposed to have negatived her claim. But the ground of this opinion is doubtful, to say the least; for there is, in fact, nothing tangible to show that the question in that case involved this equity at all. Lady Turner does not appear to have prayed it; and not a word about it, or anything like it, can be found in any part of the proceedings, so far as they can now be discovered. The real controversy in the case was one, apparently, of *separate use*; although that phrase does not occur in the report. Of the original decision, by Lord Nottingham, in the Court of Chancery, no account remains (t); but of its reversal, by the House of Lords, we have the following notice in Vernon (u).

MEMORANDUM.—That about Michaelmas last it was adjudged, in an appeal in the House of Lords in the case of Sir Edward Turner, that a term being assigned in trust for a feme, by her former husband, and she afterwards intermarrying with the late Lord Chief Baron Turner, who aliened the term, that the same was well passed away; and that the husband might dispose thereof; and my Lord Chancellor's decree was thereupon reversed. But it was agreed, that where a term is assigned in trust, for a feme, *by the privity and consent of her husband*, there, without doubt, the husband cannot intermeddle or dispose of it.

In the Journals of the House of Lords, we find an entry of the judgment in these terms:—

Upon hearing counsel at the bar, upon the petition and appeal of Sir Edward Turner, Knight, and Anne Gardner, widow, formerly the wife of William Mole, Esq., from a decree made in the Court of Chancery, on behalf of Dame Mary Turner, widow, against the petitioners, concerning the delivery of deeds of a certain annuity or rent-charge of 300*l.* per annum to the said Dame Mary, as in the said petition is set forth, as also upon the answer of the said Dame

(t) I have searched the Register, (assisted by the kindness of Mr. Monro), but in vain, for the decree in *Turner v. Turner*. (u) 1 Vern. 7.

Mary Turner put in thereunto, after due consideration had of what was offered by the counsel on either part thereupon, and hearing the opinion of most of the judges, that "inasmuch as the estate in question was an interest for years, and if the said Dame Mary Turner had had the estate in law in the said 300*l.* per annum, her husband might have assigned the same; and there being no agreement (x) that he should not have a power to dispose of the trust thereof, the said trust devolved upon him, and he had power in equity to assign the said trust, and a court of equity ought to make it good, and the deeds ought not to be taken away from the assignee who is entitled to the estate, by which he might defend his right" (y).

This reversal was voted by a great body of spiritual and lay peers, in the absence of the Lord Chancellor; the Journals stating that "the Lord President, that day, supplied his place." No law lord was present; unless we except the noted Earl of Shaftesbury, the Chancellor's personal rival and political opponent. It is true that certain of the judges delivered their opinions. But in recommending a reversal of Lord Nottingham's decision, those opinions must have gone beyond the maxim that equity follows the law—for that maxim originated with Lord Nottingham himself, whose judicial career was signalised by its establishment (z); and his decree in Sir Edward Turner's case was not likely to have disturbed a principle of which he was himself the parent. What the judges

(x) That is to say, no agreement *by the husband*. The notion of the judges who advised the House appears to have been, that a settlement to the separate use of a married woman was good only where made with "the privity and by the consent of the husband." But even where the husband merely concurred in assigning a term in trust for his wife, it was considered that the intention was to exclude his marital power;

because, otherwise, the assignment would be of no effect. Still more so where the assignment was part of a settlement made on marriage. See the Memorandum of the judgment of the Lords in *Turner v. Turner*, *supra*, p. 90; and *Pitt v. Hunt*, 1 Vern. 18.

(y) Lords' Journals, 22nd November, 1680.

(z) See Lord Mansfield's judgment in *Burgess v. Wheate*, 1 Bla. Rep. 123.

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really did advise, it is impossible with certainty to say; but it seems not improbable that they recommended the suppression of the separate use in all cases where the husband was not an expressly assenting party to its creation.

The terms of the memorandum in *Vernon*, however, as well as of the Lords' judgment, are, it must be owned, both obscure and equivocal (*a*); but all doubt as to what constituted the true subject-matter of the decision is, I humbly conceive, removed by *Tudor v. Samyne* (*b*), which came before the Court of Chancery in 1692. There a trust term had been settled in express terms to the separate use of a married woman. The husband, nevertheless, mortgaged it; and he and the mortgagee assigned it to the plaintiff, who, on bringing his bill in equity against the wife and her trustees, obtained a decree for an assignment of the legal estate; a decision which assuredly no court of equity would pronounce in the present day (*c*). Now, on what authority did this decision in *Tudor v. Samyne* proceed? On the authority of Sir Edward Turner's case, which was cited as an imperative determination of the last resort, "that a term assigned for the separate use of the wife may be sold or disposed of by the husband."

But this is not all; for in a previous case of separate use, *Pitt v. Hunt* (*d*), which came before Lord Notting-

(*a*) From the Journals of the Lords, it would appear that the decree of Lord Nottingham was made in the Court of Chancery on the 6th December, 1679.—*See Journals* of 16th November, 1689.

(*b*) 2 Vern. 270. I rely on this report, notwithstanding the note 4 Myl. & Cr. 390, where it is suggested that the case of *Tudor v.*

*Samyne* was not one of separate use. The value of *Tudor v. Samyne* for the purposes of the argument in the text, consists of the commentary which it contains on the obscure case of *Turner v. Turner*.

(*c*) So thought Mr. Jacob, 1 Rep. 177 n.

(*d*) 1 Vern. 18; 2 Cha. Ca. 73.



ham about a year after the decision of the Lords in Sir Edward Turner's case, the reversal of his decree being mentioned to him, the reporter states that the great judge "wondered at that new resolution" (d); and this surprise has been re-echoed by Lord Hardwicke (e); for the effect of that reversal was, not only to overturn prior authorities, but, in a great measure to upset the wife's separate estate, which it is evident had been, considerably before that period, established by courts of equity.

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The case of *Pitt v. Hunt* is another decision which would not be repeated in the present day; for, from the report in the 2 Cha. Ca. 73, it appears that the trust term in question was assigned "to friends in trust, to be at the wife's disposal, whether sole or covert," words which clearly constituted a separate use (f); and yet Lord Nottingham felt himself constrained to give effect to the husband's disposition of it, although that husband had deserted his wife, allowed her nothing for maintenance, and refused a reconciliation. This Lord Nottingham reluctantly did, solely in obedience to the new precedent which the Lords had set up in Sir Edward Turner's case.

If the Lords' judgment in Sir Edward Turner's case had merely asserted that equity followed the law, and that

(d) Lord Nottingham said, "That although at first there was possibly no great reason for those resolutions that the husband could not dispose of a trust for the feme made without his privity before marriage, yet the law being so settled, people made provisions for their children according to what the law was taken to be; and now those provisions are defeated by this new resolution; so that it is almost impossible for a man so to provide for his child but it shall be subject to the disposal of an

extravagant husband." It seems plain that in this passage Lord Nottingham was contemplating a trust for the wife's separate use, and had no thought of her equity to a settlement.

(e) 2 Atk. 417.

(f) See the remarks of Mr. Sweet on this case, in his Pamphlet on *separate use*, published in 1840. I am supported by his authority in holding that Sir Edward Turner's case was one of separate use.

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as a husband might dispose of his wife's legal term, he should likewise be at liberty to dispose of her trust term, there would have been nothing startling or novel in the adjudication; and least of all would it have appeared wrong to Lord Nottingham, the author of the rule; but when we find the spiritual and lay peers, with Lord Shaftesbury at their head, employing the maxim *equitas sequitur legem*, as an engine to curtail the operation of the separate use of married women, we readily sympathise with Lord Nottingham's astonishment, and agree with him that such a decision was to be obeyed, indeed, as coming from the highest judicial authority, but at the same time was deeply to be deplored.

But, in fact, the decision of the Lords in Sir Edward Turner's case (viewed in this, which I venture with diffidence to submit is its correct light), has, with one or two exceptions, been entirely disregarded by modern judges; and has been commented upon by Lord Cottenham in *Sturgis v. Champneys*(g), in a way which must, henceforth, prevent it from being relied on as an authority; the truth being, that Sir Edward Turner's case did not decide what it is supposed to have decided; and what it really did decide is no longer law (h).

Lord Cottenham's  
decision in *Sturgis*  
v. *Champneys*.

We now come to the case of *Sturgis v. Champneys*, where it appears that the wife, Lady Champneys, was entitled for life to real property, the legal estate of which was vested in mortgagees. Her husband having become an insolvent debtor, the provisional assignee, in consequence of the legal estate standing out, was obliged

(g) 5 Myl. & Cr. 97.

(h) On the 16th November, 1689, Lady Turner presented a petition to the House of Lords, praying their Lordships to reverse their judgment, and to give her the benefit of the Chancellor's decree. The re-

spondents presented a counter petition, pointing out her ladyship's long acquiescence (nine years). The House rejected Lady Turner's application.—See *Journals*, 16th November and 2nd December, 1689.

to come into a court of equity to make his title to the wife's property effectual; and the question arose whether, in consideration of his obtaining the assistance of the court to that end, he was not bound to make a provision for Lady Champneys out of the rents and profits. The Vice-Chancellor of England, upon the principle that equity follows the law, was of opinion that the case was to be disposed of precisely as if the legal estate had *not* been outstanding. In other words, he held that, in order to preserve uniformity between legal and equitable estates, the same rule should exist in both jurisdictions. The case, however, was carried by appeal before Lord Chancellor Cottenham, who reversed His Honour's decision; not disputing the maxim that equity follows the law, but holding that while equity does follow the law, it nevertheless at the same time attends to its own peculiar rules. The maxim, in fact, as here applied, means no more than that equity lends its aid to the party whom the law points out as legally entitled. But the price of that assistance must be paid wherever the Court deems it proper to impose terms. The judgment of his Lordship proceeds upon the all-pervading principle, that he who seeks equity must do equity; and this without regard to the nature of the subject-matter in contest. The following are the remarks of Lord Cottenham in disposing of *Sturgis v. Champneys*. We see from them, that while he complies with a technical rule, he forgets not the claims of justice and practical utility:—

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Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favour of the wife. In *Bosvil v. Brander* (i), in which the wife was mortgagee in fee, and the decision was against her, she being the plaintiff, the Master of the Rolls, recognising the rule, says that "it might have

(i) 1 P. Wms. 458.

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been a matter of different consideration if the assignee had been plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing of which equity would hardly have lent any assistance." Many cases followed, in which the principle was recognised; and in *Burdon v. Dean* (k), the assignees of a bankrupt husband filed a bill, praying that they might be declared entitled, during the joint lives of the bankrupt and his wife, to the income of certain freehold, leasehold, and personal estates, to which the wife was entitled for life; upon which the Master of the Rolls said, "I have no objection to what they can get at law, but if they come into this court, I will not extend the arm of the court to give them any other part of her property, without a consideration for it. Therefore let it be referred to the Master, that they may lay proposals before him." It was said that the order in this case was by consent. That I think immaterial; as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value. In *Oswell v. Probert* (l), the husband having become bankrupt, Lord Rosslyn said, "Where persons claiming in right of the husband are obliged to come into an equitable jurisdiction, to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the court will not apply it to the use of the husband, leaving the wife to starve." "Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both." And in *Ball v. Montgomery* (m), the equity of the wife was put upon the same ground. In *Brown v. Clarke* (n), Lord Alvanley said, the assignees of the husband "must make a provision for the wife before they can call it out of this court." In *Freeman v. Parsley* (o), Lord Rosslyn directed a provision for a wife against the assignees of her husband, upon the same principle. In *Mitford v. Mitford* (p), Sir William Grant said, "It is upon the ground that the assignees want its assistance to reduce the property into possession that this court imposes upon them the condition on which alone it would have assisted the husband to obtain possession." From these authorities, and many others, which recognise the same principle, it appears that the equity which this court administers in securing a provision and maintenance for the wife, is founded upon the

(k) 2 Ves. jun. 607.

(l) 2 Ves. jun. 680. See p. 682.

(m) 4 Bro. C. C. 338.

(n) 3 Ves. jun. 166. See p. 168.

(o) 3 Ves. jun. 421. See p. 424.

(p) 9 Ves. 87, 101.

well-known rule of compelling a party who seeks equity to do equity. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Such being the principle of this court, and such the authorities in favour of the wife, no case has been referred to in support of the decree. I have carefully examined the decisions upon this subject, and given them my best consideration, as I always think it right to do when I differ from the judge, whose decision I am called upon to review, not only from the respect justly due to such decision, but to afford to the parties, or rather to their advisers, the means of weighing the value of the judgment I feel called upon to pronounce; but I think it right to guard against the supposition which might be entertained, from my having so done, of my thinking this a case of difficulty or doubt. I did not feel any such difficulty or doubt at the time of the argument; and none has been suggested by the subsequent consideration I have given to the case. I must reverse the decree of the Vice-Chancellor, and refer it to the Master to approve of a provision for the maintenance and support of Lady Champneys out of the income of the estate.

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Notwithstanding this careful and deliberate adjudication, the same discussion has been again agitated by Vice-Chancellor Wigram in a recent case (g), where His Honour professes to follow the decision of Lord Cottenham rather by necessity than from choice; avowing the strongest disposition to recur to the rule which he supposes to have been laid down in Sir Edward Turner's case. After expressing his individual dissent from the decision in

Remarks of Vice-  
Chancellor Wig-  
ram in *Hanson v.*  
*Keating*.

(g) *Hanson v. Keating*, 4 Hare, 1.

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*Sturgis v. Champneys*, the Vice-Chancellor thus proceeds :—

I believe the understanding of the profession prior to the decision in *Sturgis v. Champneys* to have been, that Sir Edward Turner's case was in accordance with the principles of the court ; and I advert to that understanding the more, not only because the Vice-Chancellor (r) concurs in it, but because I know the learned editor of Mr. Roper's book on the Law of Husband and Wife always lamented the decision in *Sturgis v. Champneys*, as having, in his opinion, unsettled the law. But prior to *Sturgis v. Champneys*, the opinion of the profession had, I believe, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land.

The reasoning of the Vice-Chancellor assumes that the subject-matter of the Lords' decision in Sir Edward Turner's case, was the equity of the wife to a provision out of her trust estate ; but we have shown that the fundamental question in that case was probably a different one ; and, therefore, the remarks of His Honour (at all times entitled to great respect and attention) may be thought to detract less than they otherwise would do, from the weight of Lord Cottenham's decision.

The rule that equity follows the law, then, is not impaired or disturbed by *Sturgis v. Champneys*. But another rule, of more importance, has gained fresh strength from that adjudication ; namely, that he who seeks equity, must do equity.

In a very recent case, *Freeman v. Fairlie* (s), the Vice-Chancellor of England, upon the principle of *Sturgis v. Champneys*, directed a reference to the Master to approve of a settlement on the wife, simply because the husband's assignee was obliged to present a petition to get the fund out of court.

(r) That is to say, the Vice-Chancellor of England, whose decision was

reversed in *Sturgis v. Champneys*.

(s) Jurist of 12th June, 1847.

SECTION V.

ORDERS FOR WIFE'S MAINTENANCE.

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THE true purpose to which the income of the wife's property should be applied is the maintenance of herself and her husband. If, therefore, the husband desert his wife, leaving her unprovided for, the Court of Chancery will order the income of her property, when under its power, to be paid to the wife till the husband return to his duty. Thus, in *Watkins v. Watkins (a)* Lord Hardwicke said—

Where husband  
deserts his wife.

As it appears to the Court that the husband has gone out of the kingdom, without leaving a provision or maintenance for his wife, I decree that the interest arising from the trust money shall be paid to her till he thinks proper to return and maintain her as he ought.

In *Wright v. Morley (b)*, where the husband had quitted the kingdom, Sir William Grant; after reviewing the cases, observed—

There is no difficulty in giving the wife the dividends for her separate

(a) 2 Atk. 96.

(b) 11 Ves. 12.

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use during the absence of her husband, supposing the fact proved that he has left her unprovided (c). That is not in evidence. There must, therefore, be an inquiry whether the husband lives abroad, and has made no provision for his wife.

In such cases the Court will go out of its way to accommodate a deserted wife. Thus, in a suit for the administration of a testator's estate, the Master's report having been delayed, and it appearing upon the petition of one of the residuary legatees—an infant and a married woman—that she had been deserted by her husband, and that there was a probability of a large residue, inquiries were directed, by Lord Langdale, to ascertain the facts, and the probable amount of the petitioner's fortune, and what would be a proper allowance for her past and future maintenance (d).

Where his business compels him to move about.

But as the wife engages to participate in all the necessary vicissitudes of her husband's fate, she is not entitled to represent herself as abandoned, merely because his professional avocations may prevent him from having any settled abode, or may force him out of the kingdom. Thus, in *Bullock v. Menzies* (e), where a woman of fortune had, perhaps somewhat indiscreetly, married a captain in a marching regiment, the Court, on her petition to have the dividends of property in which she had a life-interest paid to her separate use—she objecting to accompany her husband in his military peregrinations—refused her application, Lord Chancellor Rosslyn remarking—

Here is an officer going from place to place, *in the course of his duty*, but willing to receive his wife. I cannot—because a woman does not choose to live with her husband—give her a separate alimony. It is

(c) See also *Colmer v. Colmer*, Mos. 121, and *Sleech v. Thornington*, 2 Ves. sen. 561, where Sir Thomas Clarke, M.R., says, "Where the husband was gone abroad, and left his wife unprovided for, the Court

directed payment of the interest to the wife, until the husband returned and maintained her as he ought."

(d) *Coster v. Coster*, 1 Keen, 199.

(e) 4 Ves. 798.



his property in her right; and he is willing to support her and himself out of this fund.

WIFE'S MAINTENANCE OUT OF HER EQUITABLE PROPERTY.

Where he is in prison.

When we say that the wife engages to participate in all the necessary vicissitudes of her husband's fate, it does not follow that she is bound to reside with him in prison, (even although he urge her to cohabit with him there), particularly if his incarceration be the result of his misconduct; and if, in other respects, his behaviour betray a want of proper feeling towards his wife. In such circumstances, where the wife has property subject to equitable jurisdiction, the Court will allow her a separate maintenance out of it; as appears by the following case, of which there is but an imperfect, though very long, report in Cox (*f*).

In *Atherton v. Nowell*, the wife, when only seventeen, had been induced to marry upon the false representation of her husband that he was a man of fortune, when, in fact, he was insolvent; and it appeared that a few months after the marriage, he was thrown (in 1777) into the Queen's Bench prison, where he remained till discharged by the London rioters of 1780, his wife constantly attending him, and enduring many hardships in that confinement. In 1782, he was again incarcerated, and was still unreleased in 1786, when the case came before the Court; the wife, in her application, stating that she had implored her husband to allot some fixed provision for herself and her infant child of the marriage, but that this he constantly refused to do, requiring her to cohabit with him in the prison, or to be at his mercy for such occasional support as he might think proper to bestow on her; and that from his behaviour to her, as well as on account of her own health, she was afraid of living with him any longer in gaol; adding likewise, that she was become entitled for life to the dividends of about 1300*l*. Bank Annuities, standing in the name of the accountant-general in trust in the cause; and that she and her child, being destitute, craved the protection of the Court, and prayed a reference to inquire what would be fit and proper to be allowed and paid for the future maintenance and support of herself and her child, until further order. The Lord Chancellor Thurlow, notwithstanding a cross petition by the

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husband praying that the dividends might be paid to *him*, ordered that 50*l.* cash in the bank should be paid to the wife for her separate use, and directed an inquiry so as to ascertain in what manner the growing produce of the annuities ought to be settled.

No further notice of the case appears; but if we take away the fact of imprisonment, the other circumstances ought scarcely to have deprived the husband of the income of his wife's property; he offering to receive, live with, and adequately maintain her. It was not a case of actual cruelty; and the allegation of the deception practised before the marriage is too vague for the Court to have rested upon.

Distinction between income and principal.

Where husband refuses to make a settlement.

Even where the Court will not part with any portion of the principal fund, it will allow the income to be paid to the husband so long as he resides with his wife. And this, even though he refuse to make a settlement; for (notwithstanding what is said to the contrary by Mr. Roper) (*g*), a husband is under no legal obligation to make a settlement on his wife. The Court, indeed, may refuse to surrender the principal fund till a settlement is made, but the husband is not chargeable with misconduct for non-compliance; as appears very plainly from the following remarks of Sir Thomas Clarke, M. R., in *Sleech v. Thornington* (*h*).

Various instances have been where the wife has insisted that the husband should have nothing; but the Court has not thought itself empowered to take from the husband the wife's fortune so long as he is willing to live with her, and to maintain her, and no reason for their living apart; even where the husband will not come in before the Master, the Court will not go so far as to do anything in diminution of the husband's right, so as to take away the produce from him, or prevent his receiving the interest; but constantly, where he maintains the wife, accompanies the direction for a suspension (of the principal) with a direction for payment of the interest to the husband.

(*g*) 1 Rop. Husband and Wife, 276, *et seq.*

(*h*) 2 Ves. Sen. 561.

But the husband's refusal to make a settlement will beget a just jealousy in the mind of the Court; and when accompanied by other unpropitiatory circumstances, will be a reason for withholding the income from the husband, and allowing it to accumulate for the benefit of the wife; even where he does live with her, and properly maintains her. Thus,

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In *Bond v. Simmons* (†), before Lord Hardwicke, it appeared that a legacy of 500*l.* was left to Mrs. Bond before her marriage with the plaintiff, who, although he had at different times received at least 2000*l.* from other parts of the wife's fortune, never could be prevailed upon to make any settlement or provision for her; upon which the executor refused to pay the legacy, and the husband filed his bill. The Court referred it to the Master to receive proposals for a settlement. The Master certified that the husband had never laid any proposals before him. The executor petitioned to be eased of the burden of the demand, and the Court, on his offering to pay in the money, directed the accountant-general to lay it out in South Sea Annuities for the benefit of the husband and wife, subject to the further orders of the Court. The husband died, whereupon his executor insisted that although the fund with its accumulations was a chose in action of the wife, yet by the decree and order on the accountant-general to lay it out as aforesaid, the property vested in the husband, and he was entitled to it in consequence of his maintaining his wife at the time. The Master of the Rolls (Fortescue) decided, on petition, that the principal belonged to the wife, and the dividends to the husband's representative. But upon appeal the Lord Chancellor (Hardwicke) held, that although, if the legacy had been the *only* portion of the wife, the husband would have been entitled to the dividends for her maintenance, yet, inasmuch as he had received the bulk of her fortune, and only a small part remained, and as he had perversely refused to make a settlement, the Court would have stopped the payment, not only of the principal, but of the interest also, that it might accumulate for the benefit of the wife, (unless he were starving), and inasmuch as the direction to the accountant-general was not for the benefit of the husband, but to secure the property against him, therefore his Lordship directed that so much of the order of the Master of

(†) 3 Atk. 20.

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the Rolls as directed the payment of the dividends to the executor of the husband, should be discharged.

This was not a case of misconduct on the husband's part, although it is so put by Mr. Roper. The ground of the decision is simply that the husband had already laid his hands on the bulk of his wife's fortune; and, therefore, when he came into equity for the residue, the Court, on his refusing to make a proper settlement, punished him for his obstinacy by retaining, not only the principal fund, but the interest also, although his wife at the time was maintained by him.

Where husband's  
cruelty compels  
wife to leave him.

But where a husband, by his cruelty to his wife, forces her to leave him, the consequences, as to her claim for separate maintenance, will be the same as if he had deserted her. Thus, in *Oxenden v. Oxenden* (k), where the husband, Sir James Oxenden, by his cruelty had compelled his wife to separate from him, the Lord Keeper Wright decreed that a trust fund of 6000*l*. "should be placed out at interest for the plaintiff, Lady Oxenden, to receive it for her separate maintenance, until there should be a cohabitation" (l). And in *Williams v. Callow* (m), the Court took cognizance, not only of the husband's cruelty, but likewise of his dissipation, domestic irregularities, and improvident expenditure. It was a case, says the report, where the husband proved "drunken, rude, and abusive to his wife," and moreover wasted his substance in riotous living;—whereupon the wife, though it is not stated that she had actually separated from him, filed her bill to have

Where he is dis-  
solute, improvi-  
dent, and waste-  
ful.

(k) 2 Vern. 493.

(l) It appears that in this case of *Oxenden v. Oxenden*, the Court deprived the husband of the interest of the wife's fortune; although, by articles before marriage, it was to be paid to him for life. This was

taking from him what belonged to him by express contract, and was, perhaps, going too far. See 2 Ves. Jun. 198; 1 Rop. 279, Mr. Jacob's note. However, the trust was still unexecuted.

(m) 2 Vern. 752.

the interest of her fortune paid to her for her separate maintenance, and the Lord Chancellor Cowper so decreed; declaring—

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That this was a stronger case than that of Sir James Oxenden; there, only ill-behaviour, and beastliness of Sir James; here, cruelty mixed with it. Sir James Oxenden, of substance to have maintained his wife, and lived suitably to his estate. Here, the husband has wasted all, and has no fixed habitation, but goes from ale-house to ale-house; and both cases alike, in that the wife's fortune was in trustees.

But the mere allegation that the husband's difficulties prevent him from supporting her in a style corresponding with her quality or the fortune she may have brought him, is no reason for awarding her a separate maintenance. Thus, in *Vaughan v. Buck* (n), the Vice-Chancellor of England said, "The Court will not interfere with the marital rights of the husband over the income of his wife's life-interest, so long as he maintains her to the best of his ability, they living together" (o).

Where, though in difficulties, he yet maintains his wife.

The Court will not permit the equity to maintenance to be defeated by any trick or contrivance of the husband. If, therefore, as in *Colmer v. Colmer* (p), he, with a view of deserting his wife, make a fraudulent conveyance of his own and her property to trustees, the Court will follow her property and order her an allowance out of it.

Fraud upon this equity.

And persons making necessary advances of money to her, when she is in circumstances which give her a right

Advances to wife when she is entitled to separate maintenance.

(n) 7 Jurist, 338.

(o) How far this decision may have proceeded on the circumstance of the wife's property having consisted, not of a sum in gross, but of a life-interest, and consequently how far it may be supposed to fortify the distinctions taken in *Elliot v. Cordell* and *Stanton v. Hall* (*supra*, pp. 72, 73, 74), may deserve consideration. The

report of *Vaughan v. Buck*, in Simons, vol. 13, p. 404, is ex relatione, and makes the Vice-Chancellor say, "I have no right in this case to interfere with the right of the husband to receive his wife's income. They are living together, and he is maintaining her as well as he can. Therefore I shall dismiss her petition," &c.

(p) Moo. 113.

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PROPERTY.

Orders for main-  
tenance contem-  
plate reconcilia-  
tion.

to separate maintenance, will be entitled to repayment out of her equitable property. This harmonises well with the rule at law, whereby it is wisely held that a husband deserting his wife leaves her credit for necessaries (g).

These orders for maintenance are always made with a view to the probable, or possible, reconciliation of the parties. They are, therefore, in the nature of temporary and provisional orders. Thus, in *Head v. Head* (r), Lord Hardwicke being of opinion that there was no sufficient ground for permanent separation, made the continuance of the maintenance to depend on the future conduct of the parties; observing that if Lady Head did not return in a month after the date of the decree, (her husband having judicially agreed to receive her,) the maintenance would cease; but that if on her return Sir Francis refused to receive, maintain, and treat her as his wife, the maintenance in that case would continue. And in a very recent case, *Gilchrist v. Cator* (s), before the Vice-Chancellor Knight Bruce, where the husband had by his misconduct compelled his wife to part from him, His Honour, declaring that "the conduct of the husband was without justification or excuse," held that the wife was entitled to receive the whole of the annuity in question for her separate support; but the Court added that "the husband might afterwards so conduct himself as to be entitled to come to the Court and ask that the order made might be varied or rescinded." Orders of this sort are of frequent occurrence. Thus, the Vice-Chancellor of England, in *Coster v. Coster*, tells us that "many such orders have been made from time to time, and I have made some in course of this very year" (t).

Frequency of such  
orders.

(g) *Guy v. Pearkes*, 18 Ves. 196.

(r) 3 Atk. 295, 511, 547. See this case further commented on, *infra*.

(s) Jur., 12th June, 1847.

(t) 9 Sim. 597.

The amount to be allowed the wife for maintenance is in the discretion of the Court, having a due regard to all the circumstances of the case. Thus, in *Wright v. Morley* (u), where the husband had granted an annuity of 100*l.* out of his wife's interest in an annuity of 260*l.*, and had subsequently deserted her, Sir William Grant allowed the wife only the remaining 160*l.* a year for her maintenance. But where she has no other support, the Court will generally give a deserted and meritorious wife the whole income of her equitable property till further order (v).

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Amount generally allowed.

Where the wife forms an adulterous connexion and elopes from her husband, is he entitled to come into a court of equity claiming her choses in action, she living apart from him with her paramour? This was the great question in *Ball v. Montgomery* (x), where Lord Chancellor Rosslyn declined to assist the husband: observing—

Wife's adultery.

This fund is to be a mutual provision for them living together. If I give the whole to one when separated, I defeat the mutual interest both had in it. Whatever may be the delinquency of the wife, can I let the husband have it? Her delinquency is a good ground for not paying it to *her*, but is not a ground for me to let him receive the whole of this property, which, being hers originally, was intended to be his partly to support her. I cannot let her have it, nor the husband; for then she would be left unprovided for; and see the consequence. From her past and still subsisting misconduct I must continue her in a state of adultery, or reduce her to beggary.

This reasoning is akin to that upon which the House of Lords, in passing a Divorce Bill on proof of the wife's adultery, will not, if she has brought a fortune to the

(u) 11 Ves. 12.

(v) *Gilchrist v. Cator*, Jurist, 12 June, 1847 (*supra*, p. 106). *Coster v. Coster*, 9 Sim. 597 (*supra*, p. 106). See further on this head "Wife's Equity to a Settlement," *supra*.

(x) 3 Bro. C. C. 339; and 2 Ves.

Jun. 191. "In *Ball v. Montgomery*, the property to which the suit related was not affected by the settlement on the marriage. It was left as the chose in action of the wife." Per Sir L. Shadwell, in *Duncan v. Campbell*, 12 Sim. 616.

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How far questions of matrimonial conduct cognisable in Chancery.

husband, allow her to be left destitute (y). But there the husband is remunerated by a release from his fetters—whereas, when the Court of Chancery withholds aid, it gives him no compensation.

It has been said that the tendency of later decisions in equity has been to leave questions of nuptial conduct to the spiritual courts. The boundaries of the two jurisdictions in causes matrimonial are indistinct and shadowy; betraying in some respects the marks of a common original. However, this much is certain: that wherever the husband refuses, or neglects, or is unable to maintain his wife, or wherever he compels her to separate from him, the Court of Chancery will give her a maintenance, when necessary, out of her equitable choses in action, provided her own deportment be not such as to forfeit all claim to judicial interposition. On this subject Mr. Jacob observes, that where a wife separates from her husband, “*by her own act, or with his consent*, and applies for a maintenance out of her trust property, alleging that the separation was rendered necessary by the husband’s ill-treatment, it is very doubtful whether the Court of Chancery would now entertain any original jurisdiction to determine that question, though it would probably suspend the payment of the interest to the husband, on the ground that while the separation subsists, it is not applied to its proper purpose—the maintenance of both. If in such a case the question of conduct should be decided by the ecclesiastical courts in favour of the wife, there would be a good ground for a court of equity to allow her a maintenance out of her trust property, as the ecclesiastical courts cannot give any remedy for alimony beyond a personal decree against the husband. Possibly, similar relief in equity might in some cases be given to her during the

(y) Macqueen’s House of Lords, p. 538.



proceedings in the ecclesiastical courts, to render effectual an allowance of alimony pendente lite when awarded to her by those courts."

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The supposed aversion of the Court of Chancery to examine into nuptial conduct is not very conspicuous in its decisions. It is true the equity Judges do not now grant divorces (z), as they did heretofore, and as some may think they ought to do again: but there is scarcely an order made on questions of maintenance which does not, more or less, proceed on a reference to the behaviour of one, or both, of the married parties.

Sir John Leach, M. R., in the case of *Aguilar v. Aguilar* (a), lays it down that the equitable right to maintenance does not hold where the wife has a competent separate property. But this, I apprehend, must not necessarily and in all circumstances be taken to import that the Court would allow the income to be paid to the husband; for if he had deserted his wife, or had been otherwise guilty of matrimonial delinquency, the income might be allowed to accumulate, as in *Bond v. Simmons* (b).

Where she has separate property.

The wife's right to maintenance will be enforced by the Court of Chancery upon a bill brought by her against her husband, and filed (as in the case of her claiming a settlement) through the instrumentality of her next friend.

How maintenance is enforced.

When abandoned by her husband, the wife may sue for payment of a legacy. But she must still sue as a femme couverte. Thus, in a late case (c) before Lord Chancellor Sugden, the plaintiff, a married woman, but deserted by her husband, filed her bill as a femme sole, to enforce payment of a legacy bequeathed to her after

When deserted, the wife must sue as if couverte.

(z) Tothill's Rep. p. 61, ed. 1649, p. 124, ed. 1671; 1 Spence's Equity and Jurisdiction, 702; Art. thereon in the Law Review, August, 1846. See also *infra*, Chap. 9, Sect. I, Law

of Divorce.

(a) 5 Mad. 414.

(b) 3 Atk. 20, see *ante*, p. 103.

(c) *Johnson v. Kirkwood*, 4 Dru. & War. 379.

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the abandonment. There being some evidence to show that the husband was still alive, the Court at the hearing gave liberty to the plaintiff to amend the bill by adding a next friend, making her husband a defendant, and charging him to be out of the jurisdiction and to have abandoned his wife.

Maintenance by  
contract out of  
the husband's  
means.

It seems fitting here to mention a species of order for the wife's maintenance out of the husband's property, and proceeding upon contract; of which we have, I think, the last example about a century ago before Lord Hardwicke, in a very singular case, that of *Head v. Head* (d); of which the leading facts were, that Lady Head filed a bill against her husband, Sir Francis Head, for maintenance, on the ground of an agreement contained in a letter from him to Sir John Boyce, the father of the plaintiff, saying, "he had a great affection for her; but, from her misfortune, not her fault, he did not choose to be a witness of her infirmities; and that so long as they continued separate, he would allow her 100*l.* a quarter." Sir Francis, by his answer to the bill, insisted that "he had requested of her to come home and cohabit with him, and was extremely desirous of it." But before this answer came in, Lady Head filed articles of the peace against him, and obtained an order that he should enter into recognizances, with sureties for his good behaviour; which order he complied with. The Lord Chancellor Hardwicke, without holding that such a state of circumstances warranted Lady Head in permanently separating from her husband, was however of opinion that it formed an excuse at least for keeping from him for some time, "till their passions might be supposed to subside; as there was still a prospect that by the interposition of friends, an ultimate reconciliation

might be effected." He therefore ordered that 400*l.*, one year's allowance, should be paid to her; observing—

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I will not direct it for the future; for I do not think her entitled to 600*l.* which she prays by her motion (e); because the answer has been put in half a year past, in which he offers to cohabit with her. This is not making a decree, as has been said, before hearing; but only doing what the husband himself is obliged to do, maintaining the wife till the cause is heard on the merits, and what I now say is abstracted entirely from any decree the Court may think proper to make, if there should not then appear to be a foundation for the agreement set up by the bill. There are instances where, notwithstanding an absolute decree for a separate maintenance, yet afterwards, upon the husband's consenting to cohabit with his wife, and promising to use her kindly, the Court have refused to continue the separate maintenance.

This was on the 12th February, 1745. The case, however, proceeded; and evidence was gone into, from which it appeared that Lady Head was subject to occasional fits of mental derangement; and that her husband had, without much ceremony, attempted to shut her up in a madhouse. In finally disposing of the case, on the 20th May, 1747, Lord Hardwicke, adverting to the prayer of Lady Head's bill, which (*inter alia*) was "for liberty to separate," observed—

As to the liberty prayed, it is not in the power of the Court to decree it. I do not find that this Court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement; and even upon this unwillingly. The agreement between Sir Francis and Lady Head was only for the payment of a maintenance during an occasional absence. Now consider what has been done to put an end to this agreement. [After stating the evidence of Lady Head's derangement, and of Sir Francis's purpose to confine her, his Lordship

(e) Her counsel moved that she should be paid 600*l.* in the meantime, being a year and a half's arrear, to maintain her till the cause should be heard.

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proceeded:—] I cannot say that Sir Francis's behaviour on this occasion was proper; but yet I will not say that this was such an act of cruelty as would forfeit the right and authority of a husband. The supplicavit (f) granted to Lady Head is no reason that she should elope from her husband; for it is a security taken for the wife upon a supposition that they are to live together. Nothing appears to show that the husband has rendered himself incapable of demanding the return of his wife; and as she appears *unreasonably* averse to return, I cannot make a decree for the continuance of the separate maintenance. As to the arrears, let them be paid to her; because some things have happened which are an excuse for Lady Head's not returning till this judicial offer of receiving her has been made by the answer of her husband. He must treat her as his wife if she do return; therefore if she do not return in a month, the maintenance will cease. On the other hand, if, on her return, Sir Francis refuse to receive, maintain, and treat her as his wife, the maintenance in that case will continue.

The encouragement to reconciliation which this decree holds out to the wife, or rather, the moral compulsion which to that end it imposes upon her, is, I apprehend, founded on the same policy as that which governs the Court in awarding maintenance to a wife out of her own trust property; and the case, therefore, to this extent, may be used for general purposes. Mr. Roper (g) so employs it; neither himself nor his learned and discriminating Editor deeming it necessary to advert to the basis of the decree, which was not an equity to maintenance, but an agreement between the husband and wife's father, liable to be put an end to, not only at the mutual volition of both the married parties, but even at the caprice of *one* of them. For while the wife had no power to terminate the separation, the husband might at any moment require her to come back, and thus forfeit all right to her maintenance.

(f) She had sued out a writ of supplicavit against her husband.

(g) 1 Rop. 283.

This decree, therefore, must be owned to be of an anomalous character; resembling a common order for maintenance, in that it is liable to be superseded by the husband's return to duty; but differing from such order in two respects.—1st, as directing the payment to be made out of the *husband's* means; and 2ndly, as being founded, not upon an equity, but upon contract. I have seen nothing like it in the modern reports; nor do I know whether it ought to form a guide for any modern determination (*h*).

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SECTION VI.

WIFE'S POWERS UNDER THE 91ST SECTION OF THE FINES AND RECOVERIES ACT (*i*).

WIFE'S POWERS UNDER 3 & 4 WILL. 4, c. 74, s. 91.

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| <p>1. <i>Section 91: not substitutory but remedial</i> . . . 114</p> <p>2. <i>Its provisions, enabling the wife to dispose of her property without her husband's concurrence</i> . . . 115</p> <p>3. <i>Case of Mrs. Thomas, where husband and wife had lived apart for twenty-four years, and he had become deranged</i> . . . 116</p> <p>4. <i>The practice is to proceed upon affidavit only</i> . . . 116</p> <p>5. <i>Case of Mrs. Shuttleworth, where the husband had for many years entirely disappeared</i> . . . 116</p> <p>6. <i>Case of Mrs. Woodcock, where the husband and wife were living separate by mutual consent</i> . . . 117</p> <p>7. <i>Case of Mrs. Shirley, where husband was living abroad in adultery</i> . . . 118</p> | <p>8. <i>Case of Mrs. Horsefall. Evidence required, where the husband is absent, and a presumption of his death is sought to be established</i> . . . 118</p> <p>9. <i>Case of Mrs. Mirfin, where the wife was heir of a surviving trustee</i> . . . 118</p> <p>10. <i>Case of Mrs. Duffill, where the husband was living apart by sentence of divorce</i> . . . 119</p> <p>11. <i>Form of Rule of the Court of Common Pleas dispensing with the husband's concurrence</i> . . . 119</p> <p>12. <i>Case of Mrs. Turner, where the object was to extinguish dower</i> . . . 119</p> <p>13. <i>How far the wife's conveyance by authority of the Court bars the husband's rights</i> . . . 122</p> |
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WE have already adverted to certain provisions of the

(*h*) See, however, 1 Fonb. Eq. 96; *Angier v. Angier*, Gilb. Rep. 152; Pre. in Cha. 496.

(*i*) 3 & 4 Will. 4, c. 74.

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Fines and Recoveries Act (*j*). Those provisions were all of a *substitutionary* character, enabling married women to do, in a new form, things which before the Act they could do in an old form abolished; that is to say, enabling married women to dispose of their estates *by deed*, without fine or recovery; but requiring that in all cases the husband's concurrence should be had; and also that the wife should be separately examined to ascertain that her act was done voluntarily.

Section 91: not  
substitutionary  
but remedial.

But it occasionally happens that the concurrence of the husband cannot be procured; and the circumstances, owing to causes arising in the marriage state, may make it expedient that his concurrence should be dispensed with. For this contingency the 91st section of the act (to which we will now direct attention) makes provision, by enabling married women, in particular situations specified, to dispose of their estates, without their husband's concurrence, as effectually as if their husbands had concurred. It is not substitutionary, but *remedial*; and was so deliberately intended by the able and skilful conveyancer who framed it (*k*). The words of the section are as follow:—

Its provisions.

Provided always, and be it further enacted, that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, (and whether he shall have been found such by inquisition or not), or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife (either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever), it shall be lawful for the Court of Common Pleas, by an order to be made in a summary way upon the application

(*j*) *Supra*, p. 28.

(*k*) I have the authority of Mr. Brodie himself for saying so.

of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders, to be done, executed, or made by the wife, in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a femme sole; and when done, executed, or made by her, shall be as good and valid as if the husband had concurred; *but without prejudice to his rights as then existing independently of this act.*

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s. 91.

Therefore, if a husband labour under incapacity, if his residence be unknown, if he be in prison, or if he be living apart from his wife, the Court of Common Pleas may dispense with his concurrence in any deed to be executed by his wife, which, but for this enactment, would, without his concurrence, have been invalid. The Court, however, unless the husband be beyond reach, will require evidence that a proper application has been made to him for his concurrence, and that it has proved unsuccessful (*l*). The cause, too, of his non-concurrence must appear to be such as to justify the Court in dispensing with his concurrence (*m*).

The Court of  
Common Pleas,  
where a husband  
is a lunatic, &c.,  
may dispense with  
his concurrence,  
except where the  
Lord Chancellor,  
&c., or the Court  
of Chancery, shall  
be protector of a  
settlement in lieu  
of the husband.

To this important alteration in the law there seems reason to believe that the attention of the profession has not yet been sufficiently directed. The clause appears to make no distinction between the case of incapacity, and the case of delinquency, on the husband's part. What, moreover, may be the intended effect of the words "but without prejudice to the rights of the husband, as then existing independently of this act," I have seen nowhere defined. Abstaining, therefore, from commentary, I select for elucidation the chief cases in which the Court of Common Pleas has interposed in pursuance of the Act. The first

(*l*) *Re Mirfin*, 4 Man. & Gr. 635.

(*m*) *Re M. Williams*, 1 Man. & Gr. 881.

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s. 91.

Case of Mrs.  
Thomas, where  
husband and wife  
had lived apart  
for 24 years, and  
he had become  
deranged.

of these was *Exparte Thomas* (n), where, as appears by the report, the married parties had for many years lived separate, and the husband had latterly become deranged. Under these circumstances, his wife, Mrs. Thomas, desiring to dispose of her estate,—

Mr. Serjeant Bompas moved the Court of Common Pleas that she might be at liberty to make, without the concurrence of her husband, a disposition by deed of certain messuages, lands, tenements, and hereditaments, in the counties of Anglesea and Caernarvon, to which she was entitled as tenant in tail in possession, and tenant in fee-simple in possession. The motion was founded on the affidavit of the wife, sworn before a commissioner duly qualified to take affidavits, that a messuage or dwelling-house in Caernarvon was devised to her in fee by one William Roberts, and that she was also entitled to a certain messuage in Bangor, as tenant in tail in possession; that she and her husband had lived apart from each other for twenty-four years last past; that, some time since, her said husband had become deranged, and had been so found, &c. Rule absolute in the first instance.

The practice is to  
proceed on affi-  
davit only.

Here it may be observed that the matter of evidence having been left by the clause to the discretion of the Court, the established practice is to proceed upon affidavit only. And an affidavit by the wife herself will in no case be dispensed with. Thus in *Re M. Williams* (o),—

PER CUR.—We cannot make an order on the affidavit of a third person. If she be unable to write, she may at least put her mark to an affidavit; for otherwise she could not make a conveyance.

Case of Mrs.  
Shuttleworth,  
where the hus-  
band had for  
many years en-  
tirely disap-  
peared.

In *Exparte Shuttleworth* (p), the husband had for many years entirely disappeared.

Mr. Serjeant Andrews moved that the concurrence of the husband might be dispensed with, on an affidavit stating that the wife was married to him in the year 1816, that he left her in 1820, that she had

(n) 4 Moore & Sc. 33.  
(o) 2 Scott, N.C. 120,

(p) 4 Man. & Gr. 332, n.



never heard or received any information respecting him since, that his present residence was altogether unknown to her, that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and finally, that if the application were not complied with she would be liable to incur a forfeiture. Rule absolute.

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UNDER 3 & 4  
WILL. 4, c. 74,  
s. 91.

The Court of Common Pleas in another case granted a rule on the mere ground that the parties were by mutual consent living apart from each other.

This was in the matter of Sarah Woodcock (*q*), the marginal note to the report of which case is in the following words:—"The concurrence of the husband in a conveyance by a wife of *her separate property* will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join unless part of the purchase-money is paid to him." But the body of the report does not represent the property as *separate property*. It is as follows:—

Case of Mrs.  
Woodcock, where  
the husband and  
wife were living  
separately by  
mutual consent.

Mr. Serjeant Clarke moved for a rule to enable Sarah Woodcock, a married woman living apart from her husband, to convey her interest in certain freehold property at Coventry. The motion was founded upon the affidavit of the wife, which stated that she was married to Thomas Woodcock, on the 25th December, 1827, and that they had lived together for about eight weeks and then separated, and had never since lived or cohabited together, but had ever since lived separate and apart from each other, and that she had ever since and still resided at Coventry, and her husband at Hinckley, in the county of Leicester; that she was entitled to the property in question under the will of one James Woodcock, and had contracted to sell the same to one Needham for 45*l.*; and that she had caused an application to be made to her said husband to join with her in conveying the same to Needham, pursuant to her said contract; and also the affidavit of a clerk to an attorney, which stated that he had called upon the husband and had informed him of his wife's right to the property in question, and that she had contracted to sell it, and asked him if he would join in the conveyance

WIFE'S POWERS  
UNDER 3 & 4  
WILL. 4, c. 74,  
s. 91.

thereof; and that the husband refused to join in or sign any deed unless he received one-half of the purchase-money.

Tindal, C. J.—The husband's refusal to concur in the conveyance, except upon the terms stated, is a sufficient reason for granting the application.—FIAT.

Case of Mrs.  
Shirley, where  
husband was liv-  
ing abroad in  
adultery.

In *Exparte Anne Shirley* (r), the marginal note of the Report states that the Court authorised a femme coverte to convey her copyhold property; her husband having resided abroad for more than twenty years with another woman. But in the body of the Report it is stated that the property in question had been devised to the applicant "to her sole and separate use."

Tindal, C. J.—If the property is copyhold you need not come here.

Whateley.—By s. 91 this court may dispense with the concurrence of the husband in *any* case where he is living apart from his wife.

Tindal, C. J.—That over-rides the 77th section, which seems to exclude copyholds.

Case of Mrs.  
Horsefall.  
Evidence re-  
quired, where  
the husband is  
absent, and a  
presumption of  
his death is  
sought to be es-  
tablished.

The non-concurrence of the husband must be satisfactorily accounted for (s); and to obtain a rule for the wife to convey, on a presumption of death arising from his absence, she must make affidavit negating any communication from him during such absence (t).

Case of Mrs. Mir-  
fin, where the  
wife was heir of a  
surviving trustee.

In *Re Mirfin* (u), the wife was heir of a surviving trustee; and her husband not only lived apart from her, but was in a nervous and excitable state, so as to render it difficult to procure the execution by him of any legal instrument. The Court, however, refused to dispense with his concurrence in the conveyance of the property, although neither husband nor wife had any interest in it, until an application had been made to him to concur.

(r) 5 Bing. N. C. 226.

(t) *Re A. Horsefall*, 3 Man. &

(s) *Re M. Williams*, 1 Man. & Gr. 132.

Gr. 881.

(u) 4 Man. & Gr. 635.

In *Ex parte Anne Tanner Duffill* (v), the marginal note of the report states that the court settled the form of a rule to dispense with the concurrence of a husband in a disposition by his wife of "her separate property." There is nothing in the body of the report to show that the property in question was separate property. But the rule is as follows :

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UNDER 3 & 4  
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s. 91.

Case of Mrs. Duffill, where the husband was living apart by sentence of divorce.

It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to *dispose of, release, surrender, or extinguish*, all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the Court by the said affidavit that the said Henry Holland Duffill is *living apart from his said wife by sentence of divorce*.

Form of Rule of the Court of Common Pleas dispensing with the husband's concurrence.

Upon a motion on the part of a married woman for liberty to convey her property, without the concurrence of her husband, on an allegation of his being a lunatic, the affidavit must, in distinct terms, state, or must by necessary implication import, that he is of unsound mind at the date of the application. Thus, in the matter of *Jane Turner* (w), where the object was to enable a married woman to release her right of dower out of her husband's estate :—

Case of Mrs. Turner, where the object was to extinguish dower.

Mr. Serjeant Channel had, on a former day, obtained an order to dispense with the concurrence of the husband of *Jane Turner* in a conveyance for the extinguishment of her right to dower in a certain estate, the husband being a lunatic. The application was founded upon the affidavit of the wife, which stated that the deponent was married to *John Turner*, at &c., on the 22nd of June, 1819; that a commission of lunacy was, in or about the month of January, 1841, issued by the Lord High Chancellor of Great Britain, against the said *John Turner*, under which he had been duly found a lunatic; that *Charles Challen*, of &c., had been appointed the committee of his estate; that, by an order made in the matter of the said *John Turner*, by the Chancellor, bearing date the 28th of March, 1846, his Lordship did order, that, for the purpose of

(v) 6 Scott's N. R. 30.

(w) 3 Com. Pleas Rep. 166.

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UNDER 3 & 4  
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s. 91.

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raising a fund for the discharge of the debts, incumbrances, and costs then due and owing from the said lunatic and his estate, the estate of the said lunatic, situate at Elvetham, in the county of Southampton, should be, under the provisions of the 11 Geo. 4 & 1 Will. 4, c. 65, "for consolidating and amending the laws relating to property belonging to infants, femmes covert, idiots, lunatics, and persons of unsound mind," sold to Lord Calthorpe, at the price approved of by the Master, and upon the terms specified in the agreement therein mentioned; and, upon payment of the sum of 3,500*l.*, the purchase-money for the said estate, his Lordship did further order, that the said Charles Challen, as such committee as aforesaid, should, in the place of the said lunatic, execute such deed or deeds as should be necessary for conveying the said estate at Elvetham to Lord Calthorpe, his heirs and assigns, or as he or they should direct, such deed or deeds to be settled and approved of by the Master in lunacy, in case the parties differed about the same; that, on the occasion of her marriage with the said John Turner, no settlement, or agreement for a settlement, was made upon, nor any jointure in lieu of dower, and that her right to dower still existed in the said estate at Elvetham, and the deponent was desirous of extinguishing such right, so that the conveyance of the said estate at Elvetham to Lord Calthorpe might be made free therefrom.

The clerk of the rules having suggested a doubt whether the above affidavit sufficiently showed that the husband was *still* a lunatic, the learned Serjeant now renewed his motion.

PER CUR. — We think the necessary inference, from the facts stated in the affidavit, is, that the husband is still a lunatic; and therefore the rule may go.—FIAT.

I have set out this affidavit at length, because the case to which it relates differs from the others in that the interest which the wife proposed to surrender was an interest, not in her own, but in her lunatic husband's estate. That interest consisted of her right to dower, and the object was to enable his committee to make an unfettered and absolute conveyance to a purchaser.

The intention of the clause is, that, under the authority of the Court, the wife shall have power to act as if she were a femme sole; the want of her husband's concurrence

being supplied by the rule dispensing with it. Wherever, therefore, the concurrence of the husband is necessary and proper, but cannot be procured, the Court must be applied to.

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The 77th section of the Act (before set out) (*x*) enables married women, as we have seen, to dispose of their estates by deed, *their husbands concurring*. The 91st section, now under consideration, is intended to provide for the case where that concurrence, though necessary and proper, is withheld. It might therefore have been expected that the latter clause would be simply suppletory to the former; so that wherever a married woman might, under the 77th section, dispose of her estate *with* her husband's concurrence, she might, in the event of his improperly refusing to concur, dispose of her estate by a rule under the 91st section *without* his concurrence. The words of the two sections, however, do not admit of this construction, for they are by no means correspondent with, or co-relative to, each other. On the contrary, the variance between them is too conspicuous to be accidental or unintentional.

Thus, for example, there cannot be a doubt that the 77th section applies to the case of a married woman executing a deed to release her right of dower; because the words of that section expressly specify "any estate which she alone, or which she and her husband in her right, may have."

But there are no such words in the 91st section, which plainly points at the husband's interest in the wife's property, but certainly does not appear so plainly to point at the wife's interest in *his* property (*y*). And this would,

(*x*) *Supra*, p. 28.

(*y*) The words "release and extinguish," too, which are appropriate

to dower, are carefully repeated in the 77th section; but do not once occur in the 91st section.

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UNDER 3 & 4  
WILL. 4, c. 74,  
s. 91.

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How far the wife's  
conveyance by  
authority of the  
court bars the  
husband's rights.

perhaps, have made it doubtful, (had it not been for the decision last cited), whether the 91st section applied at all, or was meant to apply, to the case of a woman executing a deed for the extinguishment of her dower.

It would seem that the 91st section was meant for the *benefit* of married women. If so, perhaps the intention of the clause is that a deed executed by authority of the court shall take out of the husband the entire beneficial interest, as well as the dry legal estate, in his wife's property. On the other hand, some meaning must be ascribed to the words "but without prejudice to the husband's rights as then existing independently of this Act;" and it is not easy to comprehend how his rights can escape "prejudice," if the wife, without his concurrence, (and, it may be, without his knowledge), shall have power to sell the property, giving the purchaser a good and absolute title, with a sufficient discharge for the purchase-money. This, peradventure, may be a question for a Court of Equity to determine, should any husband (whose valuable marital rights have been extinguished in this summary fashion upon *ex parte* representation by affidavit only) think proper to raise it. A purchaser from the wife has not only notice of the husband's rights, but notice, also, of the saving words by which those rights are guarded from invasion. So that in a conceivable state of circumstances, it might be deemed no great excess of caution were he to seek the protection of a decree before paying his purchase-money. Whatever may be thought of this speculation, there is one thing tolerably certain, namely, that the effect of the 91st section of the Fines and Recoveries Act has been to throw upon the Court of Common Pleas a heavy judicial responsibility, requiring the exercise of great vigilance and circumspection in carrying out its provisions.

SECTION VII.

TITLE BY THE CURTESY INITIATE.

CURTESY INITIATE.

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|--|--|
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Does not arise from the marriage, but from an act done in the marriage state.

THIS estate does not arise from the fact of matrimony, but from an act done in the marriage state. Thus, on the birth of issue capable of inheriting the wife's real property, the husband, as the father of such issue, acquires, in his own right, an estate for life, called tenancy by the curtesy initiate; which estate, however, does not become consummate till the death of the wife.

Tenancy by the curtesy initiate, though thus called into being by the birth of issue capable of inheriting, is not liable to be determined by the death of such issue, or even by such issue attaining majority.

Though incident to the birth of inheriting issue, not liable to be defeated by the death of such issue.

The peculiarities of this estate are discussed in the common books of real property and conveyancing. It is here mentioned chiefly for conformity; the title of the husband by the curtesy having in fact undergone but slight change, if any, since the days of Littleton (z).

Slightly, if at all, changed since Littleton's time.

(z) For "Title by the curtesy consummate," see *infra*. As to how far curtesy may be affected by the new law of inheritance, see Williams on Real Property, p. 169. Questions on the law of curtesy rarely occur in modern times, because the interests of husbands in the lands of their wives are now generally ascertained by proper settlements made previously to marriage. Accordingly, in the last twenty-five years I see only one case reported upon curtesy, and that an unimportant one. But points of

curtesy, though not themselves the subject of controversy, arise incidentally in other litigations. Thus, in the late case of *Parker v. Parker*, before V.-C. Wigram, where the whole controversy turned on this,—whether the principal witness would not be tenant by the curtesy, if the case he proved were true. It was held he would. The evidence was rejected, and the bill dismissed with costs. Incidental questions of curtesy arise also on the Statute of Limitations.

## CHAPTER IV.

### LIABILITIES ARISING FROM ACTS DONE IN THE MARRIAGE STATE.

#### SECTION I.

#### WIFE'S INCAPACITY TO BIND HERSELF, AND EXCEPTIONS.

WIFE'S IMMUNITIES.

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Wife cannot contract civil liabilities.

But she must answer for her crimes.

WHILE under coverture, the wife, it is said, cannot contract civil liability. But crimes of her commission are personal to herself, according to the maxim *culpa teneat suos auctores*. For criminal offences, therefore, she must undergo punishment as if she were sole; and her husband, if himself innocent, of course is not responsible. So far all is clear.

Where, however, the act of the wife, without being positively criminal, involves moral turpitude on her part;



where, for example, she commits a fraud, or publishes a libel, her husband is liable; but it does not therefore follow that she is free from individual responsibility. On the contrary, it would rather appear that although, perhaps, damages could not be recovered from her during the coverture, unless she had separate property, yet, if redress were not had against the husband in his lifetime, she would, after his death, be bound in reparation. This, however, I suggest, not as a certainty, but to put the reader upon his inquiry.

WIFE'S IMMUNITIES.

How far liable for acts not criminal, but involving moral turpitude.

In an action against husband and wife for defamatory words spoken by the wife she (having separated from her husband seven years previously, and continuing apart from him) was taken in execution, but applied to the Court to be discharged on affidavit stating that she had not the means of satisfying, or any expectation of being able to satisfy, the damages or costs. It appeared, however, by affidavit on the other side, that her son, in consideration of the husband (his father) giving up to him a certain business, had covenanted to maintain his mother (the wife) during her life, provided she would reside with and assist him therein. It also appeared that, when arrested, the wife was accordingly residing with the son, and assisting him in the business. It further appeared that no goods of the husband were to be found; and it was alleged that he had gone abroad to avoid arrest. It was moreover alleged, that the wife, when separated from him, took with her 500*l.*, which she had kept, and that she had since received divers sums in payment of money lent by her while living with her husband. The Court of Queen's Bench refused her application to be discharged out of custody; Lord Denman, C. J., observing, that on motions of this sort the Court had a discretionary power. Here the wife was carrying on a distinct business apart from her

WIFE'S IMMUNITIES.

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husband. That changed the onus of proof. Under the circumstances of the case, it was reasonable to expect evidence that no one held property for her use (a).

The decision in this case does not help us to ascertain how far a married woman is liable for acts which, though bordering on criminality, are not actually subject to criminal jurisdiction. The wife, indeed, had published a libel. The action was brought *against her and her husband*. He was clearly responsible, although living apart from her. But he had gone out of the way, leaving no property to meet the demand. The wife was found carrying on a separate trade, and standing in an attitude, as regards pecuniary responsibility, very similar to that of a femme sole. The ruling of the Court would apparently have been the same had the ground of action been a debt contracted, instead of words spoken, by her. Her moral delinquency does not appear to have been an element of consideration in the mind of the Court.

Husband's Liability in such cases.

The liability of the husband for the wife's tort or quasi delict stands upon a principle of necessity as well as justice. For the wife alone cannot be sued in such a case; and if the husband were also protected from responsibility, the injured party would be entirely without redress. Thus, in an action brought for a libel published by a married woman, it is of course to make the husband a defendant; and, so long as the matrimonial relation continues, it will make no difference that the spouses are apart, unless indeed it be shown that the wife is committing adultery. Chief Justice Tindal so ruled in *Head v. Briscoe and Wife* (b), observing that "whether the separation was permanent or temporary, did not affect the question; for you cannot sue the

(a) *Fergusson v. Clayworth*, 2 Q. B. Q. B. Rep. 335; and see *supra*, p. 40. Rep. 269. See *Reg. v. Johnson*, 5 (b) 5 Car. & Pay. 484.

wife without joining the husband; and a man would be without remedy if he could not sue the husband."

WIFE'S IMMUNITIES.

The ground upon which a husband is held answerable for his wife's devastavits, or other acts done by her as executrix or administratrix, may be collected from the circumstance that these are offices which she can assume only with his sanction and approbation (c).

For her devastavits as an executrix or administratrix.

When a fraud is committed by the wife in course of her acting as agent for her husband, there is less difficulty in holding him responsible. Thus in *Taylor v. Green* (d), an advertisement appeared in a newspaper, stating that a baker's shop with the good-will of his business was for sale, and that the house was doing twelve sacks a week. The advertisement had been inserted by a broker, in consequence of a conversation with the baker's wife who managed the business for him, in which conversation she told the broker that they did between nine and ten sacks a week; upon which he said, "We must make it twelve for the paper." Attracted by this advertisement, a person proposing to purchase went to the wife and said to her, "Are you really doing anything like this business?" To which she replied, "Yes; we are doing eleven sacks;" appealing likewise to the man in the shop, who confirmed her statement. The baker himself did not appear at all in the transaction, except in so far that he received the purchase-money, and paid the broker his commission. In an action subsequently brought by the purchaser on the representation contained in the advertisement, it was held that the baker was personally and individually answerable in damages, inasmuch as though he did not make any representation himself, yet he made the wife his agent, and was bound by her statements.

For her fraud as agent of her husband.

(c) But see Mr. Justice Williams on Executors and Administrators, vol. 1, pp. 166, 167.

(d) 8 Car. & Pay. 316.

## WIFE'S IMMUNITIES.

For her quasi criminal acts as her husband's agent.

Her acts done in good faith, bind him but not herself.

She is not bound by her acts done even after his death, if before notice of his death has been received.

A wife who was proved to have authority from her husband, a paper-maker, to do certain acts in his trade, pledged paper which had no wrapper, label, or departure stamp upon it. This was a violation of the excise laws; and though not a crime, was of a criminal nature. An information was filed against the husband as answerable for his wife's act. At the trial the Chief Baron (Lord Lyndhurst) ruled that the husband was not liable. But the Court upon motion held that the authority of the wife was a question for the jury (e).

The wife's civil acts, when done in good faith, though binding on her husband, impose no obligation upon herself, either during the coverture or after it. Thus in *Smout v. Ilberry* (f), a man who had been in the habit of dealing with a butcher for meat supplied to his house, went abroad, leaving his wife and family resident in this country. The wife continued the employment of the butcher. But it was held that she was not liable for goods supplied to her by him after her husband's death, but before information of that event had been received; she having originally had full authority to contract, and done no wrong in honestly, though erroneously, representing that authority as continuing.

This case, indeed, goes further than the proposition which it is cited to sustain. In order to understand *Smout v. Ilberry*, we must observe that the representatives of the deceased husband would not be liable for the articles furnished after his death; so that the question in

(e) *Attorney General v. Riddle*, 2 Crompton and Jer. 493. The argument of Sir William Follett against the rule for a new trial was, that the defendant "could not be supposed to have sanctioned a direct breach of the excise laws." He urged that the

charge involved a *crime*, or was at all events of a criminal character; and that the wife's authority, as *agent* for her husband, did not enable her to bind him for her crimes.

(f) 10 Mees. & Wel. 1.

the case was, in fact, which of two parties, the widow or the butcher, should suffer the loss, both having acted in good faith. Why should not the determination of this point be governed by analogy to the maxim in *æquali jure melior est conditio possidentis vel defendentis*? The decision of the Court, in absolving the widow, seems just, and agreeable to law. But suppose the butcher to sue, not the widow, but the husband's representatives. His action would fail; as appears by the decision in *Blades v. Free* (g), where a man who had for some years cohabited with a woman who passed as his wife, went abroad, leaving her and her family at his residence in this country. While in foreign parts the man died. Two things were holden, and both of them important. In the first place, the Court were clear that the woman might have the same authority to bind the deceased for necessities as if she had been his wife. But, secondly, they resolved that, *even if she had been his wife*, his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received.

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Neither is the husband's representative liable.

This ruling appears to have proceeded on general and somewhat speculative reasoning. It is law, because the Court has so decided. But whether it be justice, or whether it would be followed, may be doubted. The case, however, supports what I have said, namely, that the tradesman under such circumstances must bear the loss. As in a question between him and the widow, this result appears just; but as between him and the husband's representative, there is more difficulty.

Let us now suppose the case of a widow's express promise to pay, made after her husband's death, where the

Promise to pay made by the widow after her husband's death.

(g) 9 B. & Cr. 167; 4 Man. & Ry. 282.

## WIFE'S IMMUNITIES.

debt had been contracted by her during the coverture, and where, consequently, it was binding, not upon herself, but upon her husband. The promise in such a case would be but a nudum pactum, and therefore would be void for want of consideration (*h*).

Promissory note by her.

But it has been held to be a sufficient consideration to support a widow's promissory note that it was given by her, out of respect for the memory of her late husband, to secure a debt due by him (*i*).

Where husband is civiliter mortuus.

It is only when the husband is civiliter mortuus (*k*), as in the known cases of abjuration, exile, transportation, and the like, that the wife can contract and bind herself as if she were a femme sole. Her husband is then regarded as dead, and she as his widow.

Where husband is an alien; and where an alien enemy.

In *Kay v. Duchess of Pienne* (*l*), Lord Ellenborough, differing from Lord Kenyon, expressed an opinion that a wife might be sued as a femme sole, if the husband were an alien. But Mr. Baron Parke (*m*) has suggested that "there must have been some misapprehension of what Lord Ellenborough said in that case, or his Lordship must have been in error; because he refers to the case of *Derry v. Duchess of Mazarine* (*n*), in support of his proposition; whereas that was the case of an alien enemy, who could not be in England lawfully, and therefore analogous to the case of a person transported."

Where the wife represents herself as sole.

It is a fraud in a married woman to contract on her own credit by representing herself as sole. The court formerly would not, on summary application, discharge a femme

(*h*) *Meyer v. Haworth*, 8 Ad. & El. 467.

*Hatchett v. Baddely*, 2 Black. Rep. 1081.

(*i*) *Ridout v. Bristol*, 1 C. & J. 231; Tyr. 84. See also *Nelson v. Searle*, Jurist, 20th April, 1839.

(*l*) 3 Campb. 123.

(*m*) *Barden v. Keverberg*, 2 Mee. & Wel. 65.

(*k*) Per Baron Parke in *Barden v. Keverberg*, 2 Mee. & Wel. 64;

(*n*) 1 Lord Ray. 147.

couverte arrested on mesne process under such circumstances ; but would leave her to plead her coverture (o). In so far, therefore, the Court punished the wife in her own person ; and properly so, for the imposition was practised by her as an individual, and not as agent for her husband. Still, I apprehend, the husband would be liable to make good the consequences, otherwise the party injured by the wife's fraud would, during the coverture, be remediless (p).

WIFE'S IMMUNITIES.

SECTION II.

WIFE'S AUTHORITY TO BIND HER HUSBAND WHEN LIVING WITH HIM.

NECESSARIES WHEN HUSBAND AND WIFE LIVE TOGETHER.

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|---|--|
| <p>1. <i>Wife's authority, when presumed</i> . . . . . 131</p> <p>2. <i>When she is already supplied with necessaries</i> . . . . . 133</p> <p>3. <i>Lane v. Ironmonger</i> . . . . . 133</p> <p>4. <i>Circumstances negating her authority</i> . . . . . 135</p> <p>5. <i>Case of a woman held out as a wife</i> . . . . . 135</p> | <p>6. <i>Where the wife individually is trusted</i> . . . . . 135</p> <p>7. <i>Case of husband being in India and wife here</i> . . . . . 136</p> <p>8. <i>Where husband disputes only a part of the demand</i> . . . . . 136</p> <p>9. <i>Where he disputes the whole</i> . . . . . 136</p> <p>10. <i>Articles of the peace</i> . . . . . 136</p> |
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THE wife may bind her husband either by the express or by the implied authority which he confers upon her. Cases of express authority are plain. But cases of implied authority often give rise to questions which perplex courts of justice ; and it is not an easy, if it be a practicable, task to reconcile their decisions. The effort, however, must be made.

Wife's authority when presumed.

When a wife is living with her husband, and when in the ordinary administration of their household, she gives orders for commodities which *prima facie* are proper in themselves, and not extravagant, it will be presumed that

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| <p>(o) <i>Waters v. Smith</i>, 6 Term. Rep. 452.</p> <p>(p) <i>Head v. Briscoe and wife</i>, 5</p> | <p>Car. &amp; Pay. 484, where C. J. Tindal so ruled in the case of a libel by the wife.</p> |
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she has the authority of her husband, who will consequently be bound (a). Accordingly, if an action be brought against him for the price of goods furnished under such circumstances, it lies on him to show that he is not responsible (b). Thus in *Clifford v. Laton* (c), Lord Tenterden lays it down, that "if goods are furnished to a married woman who is living with her husband, it must be taken *prima facie* that those goods are supplied to her by his authority; and it lies on the husband to show that the goods were supplied under such circumstances as to make him not liable to pay for them." It would seem that he may show this by proving that his household was already well supplied, and that, consequently, his wife's orders were unwarranted (d).

But if he knew of the extra commodities supplied upon his wife's order, if his family had had the benefit of them, and if, in fact, he himself, in his own person, had helped to appropriate or consume them, none of the decisions or dicta say that he would not be liable. On the contrary, I collect that he would be bound in such a case, although he were to prove that his establishment was, by his own order, sufficiently and even amply supplied with all necessary articles. To hold otherwise would be to contradict a maxim recommended, no less by its justness than its antiquity, *nemo debet locupletari alienâ jacturâ* (e).

(a) *Emmett v. Norton*, 8 Car. & Pay. 506; *Freestone v. Butcher*, 9 Car. & Pay. 643.

(b) *Clifford v. Laton*, 3 Car. & Pay. 15.

(c) 3 Car. & Pay. 16.

(d) *Seaton v. Benedict*, 5 Bing. 28.

(e) If one were at liberty to speak without book, it might be said that in many instances the proper inquiry would be, not simply whether the husband had sanctioned, or was

consuant of the wife's order, but also whether, in point of fact, he had by the furnishings been made *locupletior*, as the civilians express it. See 2 Rep. 112, where he says in a marginal note, "If the articles bought be not necessaries, yet if they come to the husband's use, he will be liable." This is justice and good sense at all events; but he cites no decision or dictum. In his text at the same place he says the husband



A husband who supplies his wife with necessaries suitable to her position is not liable for debts contracted by her without his previous authority or subsequent sanction (*f*).

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AND WIFE LIVE  
TOGETHER.

A recent case (*g*) before the Court of Exchequer in Banco, gives us the law in its maturest form on the subject of the wife's power to bind her husband for articles supplied upon her order. The comments upon prior authorities, and the care which marks the judgment, render the case very deserving of attention.

When she is already supplied with necessaries.

At the trial, before Pollock, C.B., it appeared that the action was brought to recover the sum of 5,287*l.*, for various articles of millinery, viz., bonnets, feathers, lace, and ribbons, supplied by the plaintiff to the defendant's wife, during part of the year 1843. It further appeared that the defendant's wife had a separate fortune, though she and her husband were living together; and that the plaintiff having been induced to make inquiry, was told he had 1,100*l.* per annum. There was no evidence of any express authority given by the husband to his wife to order the articles in question. Under these circumstances, it was contended for the defendant, that, as the articles ordered by the defendant's wife were excessive in amount, and as there was no evidence of any express authority given by him, the jury ought not to infer that the wife had any implied authority from her husband to order the goods; and the direction of Lord Abinger, C.B., in the case of *Freestone v. Butcher* (*h*), was cited to the learned judge, who told the jury, that he approved of and adopted it; and they thereupon found a verdict for the defendant. Afterwards, the plaintiff's counsel moved for a new trial, on the ground of misdirection, contending that the direction of the learned judge had proceeded upon the doctrine laid down by Lord Abinger, C.B., in *Freestone v. Butcher*, which, it was submitted, was not correct in law, and could not be supported. The learned counsel, further commenting on *Freestone v. Butcher*, proceeded as follows: "his Lordship there says, the general rule is, that a wife cannot bind her husband by

*Lane v. Ironmonger*, showing circumstances that go to prove, and to negative, the wife's authority.

will be liable, when "he allows the wife to retain and enjoy" the articles. For this, too, which seems most reasonable, I see no authority cited.

- (*f*) *Seaton v. Benedict*, 5 Bing. 28.
- (*g*) *Lane v. Ironmonger*, 13 Mee. & Wel. 368.
- (*h*) 9 Car. & P. 647.

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her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appears to the contrary, the jury do right in inferring the agency; but if the order is *excessive in point of extent*, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which a jury would infer that there was no agency. The tradesman who supplies the goods takes the risk, and if the bill is one of an extravagant nature, such as the husband would never have authorised, that would be *alone* sufficient to repel the inference of agency." So unqualified a doctrine cannot be maintained. [Parke, B.—It is because she is the agent of her husband that the tradesman ought to be careful not to supply her to an extravagant extent, for her giving orders to such an extent would go to show she was not acting as the husband's agent, and to the extent authorised by him.] The case of *Freestone v. Butcher* seems to carry the law as to the husband's exemption from liability further than any of the cases which have preceded it. This is a case in which the husband and wife are living together, and it may fairly be presumed that he had seen these articles of dress worn by his wife. In *Montague v. Benedict* (i), it is said that "cohabitation is presumptive evidence of the assent of the husband; but it may be rebutted by contrary evidence." It that case there was evidence to rebut the presumption, and the contract was held not to be within her authority. [Pollock C.B.—How can you distinguish between clothes and rings, which are both ornamental? Jewellery may be just as fit to be ordered by a lady as lace or any other article of dress. Parke, B.—The only question is, whether the extravagance of the bill is an element to be taken into consideration by the jury, in considering the question of the wife's agency. Surely it is.] It was incorrect in the learned judge to say, in the words of Lord Abinger's ruling, that the extravagance of the bill "would be *alone* sufficient to repel the inference of agency."

Parke, B.—There may be a trifling inaccuracy in the report of the case of *Freestone v. Butcher*, in stating that the extravagance of the bill would *alone* repel the inference of agency; that alone, perhaps, would

(i) 3 Barn. & Cress. 635.

not be sufficient ; but it may be repelled by that and other circumstances together. The law, as there laid down, is substantially correct. The whole turns upon the question of the husband's authority ; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject, he might have made inquiries of the husband. It was not proved that the husband knew the articles had been ordered, or saw his wife wearing them.

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WHEN HUSBAND  
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TOGETHER.

The other judges concurred ; and the rule was refused.

That the wife has a separate income, that the invoices are made out to *her*, that the plaintiff has drawn bills of exchange upon her for part payment of the amount due, and that she has accepted such bills in her own name, payable at her own banker's from her separate funds—all these are circumstances which go to repel the inference of agency, and to show that the wife was not acting by her husband's authority (*j*).

Circumstances  
negating her  
authority.

A man is liable for the debts of a woman with whom he cohabits, if he hold her out to the world as his wife (*k*). And where a man who had for some years so cohabited with a woman who had passed as his wife, went abroad, it was held that she might have the same authority to bind him by her contracts for necessaries as if she had been his wife. But that his executor was not bound to pay for any goods supplied to her after his death ; although before information of his death had been received (*l*).

Case of a woman  
held out as a wife.

In all cases the husband will be discharged if it appear that the goods were not supplied on his credit, but that the party furnishing them trusted to the wife

Where the wife  
individually is  
trusted.

(*j*) *Freestone v. Butcher*, 9 Car. & Pay. 643.

245 ; *Munro v. De Chemant*, 4 Camp. 215.

(*k*) *Watson v. Threlkeld*, 2 Esp. 637 ; *Robinson v. Nahon*, 1. Camp.

(*l*) *Blades v. Free*, 9 Barn. & Cr. 167. See comment on this case, *supra*, p. 129.

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Case of husband  
being in India  
and wife here.

individually (*m*). Thus, where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessities supplied to her, the tradesman having trusted to payment out of her allowance (*n*).

A military officer being required to join his regiment in India, left his wife in England and settled a certain sum upon her, which was regularly paid. It was held in an action by a tradesman for goods that this was not to be treated as a case of separation; but that the questions for the jury were, *first*, whether the goods supplied were necessities, considering the husband's rank; *secondly*, whether the allowance to the wife had been sufficient; and *thirdly*, whether it was not notorious in the neighbourhood that the wife was living in a style beyond her husband's station. The jury having found the first question in the negative and the others in the affirmative, the verdict was for the defendant (*o*).

Where husband  
disputes only a  
part of the de-  
mand.

If a husband, sued in assumpsit for commodities supplied to his wife, means to defend the action as to part only, it would appear that his proper plea will be that he is not liable beyond a certain amount, and he should pay that amount into Court (*p*).

Where he dis-  
putes the whole.

But wherever a husband intends to dispute the charge in toto, common honesty dictates that the articles unwarrantably ordered should be restored, and restored without delay. It is, I presume, because this is too obvious to require to be enforced, that I see it nowhere laid down.

Articles of the  
Peace.

Under the head of necessities, the common law Courts include articles of the peace. A husband, therefore, is liable to an attorney, who acts for his wife in exhibiting

(*m*) *Metcalfe v. Shaw*, 3 Camp. 22; (*o*) *Dennis v. Sarjeant*, 6 Car. & Bentley v. Griffin, 5 Taunt. 356. Pay. 419.

(*n*) *Holt v. Brien*, 4 Barn. & Ald. (*p*) *Emmet v. Norton*, 8 Car. & 252; *Montague v. Benedict*, 3 Barn. Pay. 506.  
& Cr. 631

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such articles against him (q). But the proceeding must be a proper one, and called for under the circumstances. Such a case is hardly to be resolved upon any principle of agency; for the husband cannot be supposed to give a commission to his wife to file articles of the peace against himself; but a higher power, the law, authorises her to do the needful for her own protection, and to this limited extent to bind her husband without his sanction. Accordingly, were she to go the further length of actually *indicting* her husband, the rule would be different; for it is impossible to say that a prosecution of the husband is a necessary for the wife, within the rule on this subject. Thus, per Patteson, J.—“It cannot be maintained that an indictment against the husband for assaulting his wife is a necessary” (r).

(q) *Shepherd v. Mackowl*, 3 Camp. 326.

(r) *Grindell v. Godmond*, 5 Ad. & El. 755. Articles of the peace generally assume husband and wife to be living together, (see *Head v. Head*, *supra*, p. 110), and have therefore been touched upon in this, rather than in the next, section. See, however, *Turner v. Rooke*, 10 Ad. & El. 47, where a wife living apart from her husband was obliged to exhibit articles of the peace against him, and for that purpose employed

an attorney, who, having sued the husband for the costs, it was held that the Court would not inquire whether the wife could have paid him out of her maintenance; Lord Denman observing, “she has her maintenance for other purposes.” As to articles of the peace between married parties in chancery, see Lord Campbell’s *Lives of the Chancellors*, vol. 1. p. 13. This remedy is not yet obsolete in chancery. The last instance was, I think, in 1842.

## SECTION III.

WIFE'S AUTHORITY TO BIND HER HUSBAND WHEN  
LIVING APART FROM HIM.

NECESSARIES  
WHEN HUSBAND  
AND WIFE LIVE  
APART.

- |  |     |   |     |
|--|-----|---|-----|
| 1. <i>Wife primâ facie without authority</i> . . . . .           | 138 | 8. <i>When wife is separately provided for</i> . . . . .                                | 142 |
| 2. <i>The separation must be justified</i> . . . . .             | 138 | 9. <i>When a suit by her against him in the Ecclesiastical Court is pending</i> . . . . | 143 |
| 3. <i>How separation may be justified</i> . . . . .              | 140 | 10. <i>When alimony is awarded to her</i> . . . . .                                     | 143 |
| 4. <i>Husband's request that the wife will return to him</i> . . | 141 | 11. <i>When he fails to pay alimony</i>   | 143 |
| 5. <i>When such request will determine his liability</i> . . .   | 141 | 12. <i>When wife commits adultery</i>   | 143 |
| 6. <i>Where husband allows her a sufficient maintenance</i> . .  | 141 | 13. <i>When husband forgives her</i>  | 144 |
| 7. <i>Effect of a notice to tradesmen</i>                        | 142 | 14. <i>Whether when the husband is discharged she becomes liable</i> . . . . .          | 144 |

From the last section it has been collected that when the wife resides with her husband, and when the act done by her is in the ordinary course of domestic administration, her authority to bind him will, *primâ facie*, be presumed. That is to say, will be inferred ;—subject to be rebutted by contrary evidence. But when the wife is living apart from her husband, the presumption changes sides, and the onus probandi is thrown on the party alleging the authority ; for the law casts upon married persons the duty of cohabitation ; and a husband is not bound to support a wife who, without just cause, refuses to cohabit with him (a). *Primâ facie* therefore a woman living apart from her husband has no authority to bind him.

Wife *primâ facie*  
without authority.

The separation  
must be justified.

In order to fasten liability upon the husband, therefore, the separation must be justified. Thus it is laid down with great emphasis by Lord Tenterden, that “when the wife

(a) *Etherington v. Parrott*, 2 Lord Raym. 1006.

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WHEN HUSBAND  
AND WIFE LIVE  
APART.

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is living apart from the husband, there is no presumption that she has authority to bind even for necessities suitable to her degree. It is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she has such authority. The mischief of allowing the ordering of goods by a married woman living apart from her husband to be *prima facie* evidence, so as to charge him for them, would be incalculable" (b). Hence his Lordship concludes that "it is for the plaintiff to show that she (the wife, when absent from her husband) was absent from some cause which would justify her absence" (c). In *Clifford v. Laton*, the same great judge put the thing in this form: "When a wife lives with her husband, he may in general be taken to be *conusant* of her contracts. But when they are living separate, it is for the party seeking to charge the husband to make out the proof that he is liable. If a shop-keeper will sell goods to every one who comes, he must take his chance of being paid. It lies on him to make out by full proof his claim against any the other person" (d). And again, in the same case (though given by different reporters) the Chief Justice, following out the principle to its legitimate results, arrives at this practical deduction, namely, that it is "the duty of tradesmen to inquire into the circumstances of the separation, before they part with their goods; the onus lying on them to prove that the circumstances are such as will entitle them to recover against the husband" (e).

The general presumption, therefore, against the wife's authority, it will be the first task of every plaintiff suing a husband, under such circumstances, to displace; which

(b) *Mainwaring v. Leslie*, 1 Mood. & Malk. 18, and see Starkie on Evidence, part 4, 692; Selw. N. P. Bar. & Fem. 1; *Montague v. Benedict*, 3 Barn. & Cr. 631.

(c) *Mainwaring v. Leslie*, 2 Car. & Pay. 507.

(d) *Clifford v. Laton*, Moody and Malk. 101.

(e) 3 Car. & Pay. 16.

NECESSARIES  
WHEN HUSBAND  
AND WIFE LIVE  
APART.

How separation  
may be justified.

he may do by showing that the wife's separation has arisen from no fault on her part (*f*).

In the first place, she may have been deserted by her husband. Such a case speaks for itself, and requires no commentary.

Secondly, her husband may have turned her out of doors, in which case she goes forth to the world with an implied credit for necessities (*g*).

Thirdly, her husband's misconduct may have compelled her to leave him. Thus, if a wife quit her husband's house under a reasonable apprehension of personal violence, *that* will be equivalent to his turning her out of doors. If she quit because her husband has brought a common woman to reside in it, *that* is also a sufficient reason for her going; and it is no defence to an action for necessities supplied to her under such circumstances, that she has committed adultery previously to the credit being given, if the husband did not know of it till *after*, nor that after the credit she obtained a decree for *alimony*, which alimony was to relate back to a period before the credit (*h*).

Fourthly, the separation may have been by mutual consent; in which case the husband's obligation to maintain the wife continues, since he cannot complain of her for leaving him when she does so with his own approbation (*i*). What would be the consequence of the husband's requiring her to come back, and of her refusal to do so, after a separation by mutual consent, and without delinquency on her part, the cases do not enable me to say, and it would be perhaps not very easy to determine.

(*f*) I state the proposition in this form advisedly, because whatever logicians may say, it is the constant practice to prove *negatives* in Courts of Justice.

(*g*) *Hunt v. De Blaquiére*, 5 Bing. 557.

(*h*) *Houlston v. Smith*, 2 Car. & Pay. 22, where the case of *Horwood v. Heffer*, 3 Taunt. 421, was repudiated.

(*i*) *Dixon v. Harrell*, 8 Car. & Pay. 717.



Where, however, a wife has left her husband, not by mutual consent, but upon grounds sufficient to justify her doing so, a simple request on his part that she will return to him does not of itself determine his liability for necessities supplied to her during the separation (*k*). And it is clear that if he only offers to take her back upon conditions which are improper, his liability continues (*l*).

NECESSARIES  
WHEN HUSBAND  
AND WIFE LIVE  
APART.

Husband's re-  
quest that she  
will return.

Under what circumstances a husband may require his wife's return, and when her refusal will put an end to his liability, are points thus handled by Mr. Baron Garrow in *Reed v. Moore* (*m*)—

When such re-  
quest will deter-  
mine husband's  
liability.

"If a husband drives his wife from him by his misconduct, and sends her forth with an implied credit arising from their relative situation, it is his duty by some positive act to determine that liability. If his wife subsequently returns, his liability is at an end. But in default of any amicable arrangement, he must go to the Spiritual Court, and there obtain a decree for the purpose. And until some such unequivocal act is done, a person making a claim in a Court of Law for necessities supplied to the wife, is entitled to recover against the husband."

Supposing, then, that the *prima facie* presumption negating the wife's authority has been got over by evidence showing that the separation has not been occasioned by the wife's default; the general rules respecting charges made for articles supplied to her will, I apprehend, be substantially the same as if she were not living separate. That is to say, the furnishings must truly be *necessaries*, within the meaning of the term, as explained by the decisions (*n*).

Where a husband living apart from his wife allows her enough for her maintenance, he is not liable for necessities

Where husband  
allows her a suf-  
ficient main-  
tenance.

(*k*) *Emery v. Emery*, 1 You. & Jer. 501.

(*m*) 5 Carr. & Pay. 200.

(*n*) *Emmett v. Norton*, 8 Car. &

(*l*) *Reed v. Moore*, 5 Car. & Pay. 506.  
200.

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AND WIFE LIVE  
APART.**

Effect of a notice  
to tradesmen.

supplied to her, and notice to the tradesmen of that allowance is unnecessary, because if they inquire into the circumstances of her separation, they will find that she is not in a situation to charge her husband; and if they do not choose to inquire, they trust her at their peril (*o*).

A mere notice by the husband that he will not pay for goods supplied to his wife will avail nothing, if under the circumstances of the separation he is liable (*p*). Accordingly, the common practice of advertising in the newspapers, resorted to by husbands with the view of evading liability for the acts of their wives, is of but questionable, if indeed it be of any, efficacy.

But if while husband and wife are separate, they both deal with the same tradesman, and he specially agree with the husband not to charge him for goods to be supplied to the wife, he will be bound by such special agreement, and cannot afterwards come upon the husband (*q*).

When wife is  
separately pro-  
vided for.

In *Clifford v. Laton* (*r*) the husband and wife had lived separate for many years. After the separation, the wife's father died, leaving her a provision of £200 a year, secured to her separate use, which was regularly paid to her. Upon this, the husband withdrew an allowance he had made her, and she had nothing to maintain her but her father's bequest. No evidence was given of the cause or circumstances of the separation. Lord Tenterden told the jury that they might therefore assume that the parties "lived separate by consent. Still if she had no sufficient maintenance, her husband would be liable for her reasonable debts. The question, therefore, was, whether she was reasonably provided for, considering the husband's circum-

(*o*) *Mizen v. Pick*, 3 Mees. & Wel. 487; *Emmett v. Norton*, 8 Car. & Pay. 506; *Hindley v. Marquess of Westmeath*, 6 Barn & Cres. 200.

(*p*) *Dixon v. Harrell*, 8 Car. & Pay. 717.

(*q*) *Dixon v. Harrell*, ubi supra.

(*r*) *Moo. & Malk.* 101.

stances, by her father's bequest only. If she were, the husband could not in reason, and if he could not in reason he could not in law, be called on to make any further provision for her."

NECESSARIES  
WHEN HUSBAND  
AND WIFE LIVE  
APART.

A husband is liable for necessities provided for his wife pending a suit by her in the Ecclesiastical Court, and before alimony decreed; although a decree afterwards made had directed the alimony to be paid from a date previous to the time when the necessities were provided for the wife (s).

When a suit by  
her against him  
in the Ecclesiasti-  
cal Court is pend-  
ing.

A wife having sued her husband in the Consistory Court, obtained a decree against him for alimony. He removed the cause into the Arches Court. The decree then became in law inoperative, but the husband continued making the payments under it; and it was proved that if he had omitted doing so, a new decree could, by a short process, have been obtained from the Arches Court. It was held that the husband was not liable in an action for payment of necessities furnished to the wife while the above payments were going on (t).

When alimony is  
awarded to her.

A divorce a mensâ et thoro by the Court Spiritual does not displace the matrimonial relation; nor per se, affect the pecuniary liabilities which are incident to the marriage state. Thus, if a wife obtain a sentence of divorce a mensâ et thoro against her husband for adultery on his part, with a decree for alimony, he will, if he fail duly to pay the alimony, be liable for necessities supplied to the wife (u).

When he fails to  
pay the alimony.

Finally, the wife's adultery puts an end to her authority, under any circumstances, to bind her injured spouse (v).

When wife com-  
mits adultery.

(s) 5 Barn. & Cres. 375.

*Marshall v. Ratton*, 8 Term. Rep. 545.

(t) *Wilson v. Smith*, 1 Barn. & Ad. 801.

(v) *Morris v. Martin*, 1 Str. 647;

(u) *Hunt v. De Blaquiére*, 5 Bing. 550; see further the great case of

*Manwaring v. Sands*, 2 Str. 707;  
*Emmett v. Norton*, 8 Car. & Pay. 506.

**NECESSARIES  
WHEN HUSBAND  
AND WIFE LIVE  
APART.**

When husband  
forgives her.

Whether when  
the husband is  
discharged she  
becomes liable.

If, however, he be weak enough to forgive her, he becomes again liable (*w*).

How far, when the husband is discharged by the wife's delinquency, she herself can contract liability in her own person is a point as to which light may be had by consulting the learned determination of Lord Kenyon in the great case of *Marshall v. Ratton* (*x*).

Mr. Justice Buller appears to have been of opinion that as soon as the husband was released, the wife acquired a capacity of binding herself (*y*); which seems a reasonable inference.

(*w*) *Harris v. Morris*, 4 Esp. 41;  
see also *Norton v. Fazan*, 1 Bos. &  
Pul. 226.

(*x*) 8 Term. Rep. 547.  
(*y*) *Cox v. Kitchen*, 1 Bos. & Pul.  
339.

## CHAPTER V.

### RIGHTS ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY THE HUSBAND'S DEATH.

#### SECTION I.

#### HUSBAND'S PERSONALTY—RIGHTS OF RELICT.

#### RELICT'S RIGHTS.

- |   |  |
|---|--|
| <p>1. <i>Widow generally selected to administer</i> . . . . . 145</p> <p>2. <i>Her distributive share when there is a child</i> . . . . . 145</p> | <p>3. <i>When there is no child</i> . . . 146</p> <p>4. <i>When there are no next of kin</i> . . . . . 146</p> |
|---|--|

THE dissolution of the marriage may be by the death of the husband; or by the death of the wife; or by parliamentary divorce. Each, therefore, of these contingencies we will consider in their order.

And, first, supposing the dissolution of the marriage to be occasioned by the death of the husband, and assuming the operation of general rules (in other words, assuming that the husband dies intestate, leaving the distribution of his effects to the government of the *law*), the widow, as lawful relict of the deceased, is usually, unless she renounce, appointed his sole administratrix. But the Ordinary may grant the administration either to her alone, or to the next of kin, or to both together, at his discretion (*a*).

Widow generally selected to administer.

When the husband dies intestate, leaving a widow and child, or children, or representatives by direct descent

Her distributive share when there is a child.

(a) Saik. 36; 11 Vin. Abr. 92; Stra. 552; Lovelas. 3.

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RIGHTS.

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of such child or children, his widow, by the Statute of Distributions, is entitled to *one-third* of his personal estate (*b*).

The phrase, "Thirds of personal estate at common law," though constantly occurring in legal arguments, judgments, pleadings, deeds, and formal documents, seems void of meaning. There is now no distribution of intestates' personal estates by the common law; and the phrase is still more incorrect if used to express the interest which the widow takes under the statute (*c*).

When there is no child.

When the husband dies intestate, leaving a widow only, such widow is, by the statute, entitled to *a moiety or half* of his personal estate.

When there are no next of kin.

When the husband dies intestate, leaving a widow, but (as in the case of a bastard) no next of kin, the widow is not entitled to the whole of his personal estate; but one *moiety or half* belongs to her, and the other moiety or half goes to the crown (*d*).

(*b*) 22 & 23 Chas. 2, stat. 2, c. 10, s. 6; 2 Black. Com. 515, 516.

(*c*) *Gurley v. Gurley*, 8 Cla. & Fin. 741. In this case Lord Cottenham asked "What is the correct meaning of the expression, Thirds of personal estate at common law?" To which

Mr. Pemberton Leigh answered, "It has no meaning. And it does not correctly express the interest the widow would take under the Statute of Distributions."

(*d*) *Cave v. Roberts*, 8 Sim. 214.

## SECTION II.

## THE WIDOW'S PARAPHERNALIA.

PARAPHER-  
NALIA.

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ON the death of the husband, his widow may claim paraphernalia; that is to say, such articles of personal apparel, personal ornament, and personal convenience, suitable to her rank and degree, as she continued to use during the marriage. These she may retain against all the world, except creditors when there is a deficiency of assets (a). And, even then, her necessary clothing is protected; for, in the words of an ancient judicial resolution, "She ought not to be naked, or exposed to shame and cold" (b).

Articles of apparel, and personal ornament and convenience.

Claim to necessary clothing good even against creditors.

(a) 2 Black. Com. 436; *Tipping v. Tipping*, 1 P. Wms. 730.

(b) 1 Rolle, 911, L. 55. If the husband deliver cloth to his wife for her apparel, and die before it be made up, she shall have the cloth.

1 Rolle, 911, L. 35; Com. Dig. Baron and Femme, Paraphernalia. A "necessary bed" is an article of paraphernalia. See Rolle & Comyn's Dig. ubi sup. cit.

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NALIA.

Husband can sell or give away paraphernalia, but cannot bequeath them.

Husband's possession of ornaments immaterial, if the wife had worn them on proper occasions.

Value immaterial so long as suitable.

Widow cannot claim heir-looms.

Neither can the husband by his will bequeath paraphernalia; though it appears he has the power, (if unkindly inclined to exert it), to sell them, or give them away (*c*). They are therefore not to be considered as belonging to the wife during the marriage for her separate use (*d*). For her right of property in them does not arise till she becomes a widow; but vests in her immediately on the death of her husband (*e*).

As to personal ornaments, the husband's possession of them makes no difference, provided the wife wore them at intervals. And it is enough that she so used them (*f*) on birthdays and public occasions (*g*). Nor is the question of value in this respect material, so long as the articles are suitable to her degree (*h*).

But the widow cannot claim, as paraphernal, articles which are in fact family heir-looms (*i*).

(*c*) 2 Black. Com. 436; Noy's Max. c. 49.

(*d*) *Graham v. Londonderry*, 3 Atk. 393.

(*e*) Cro. Car. 344; Com. Dig. Bar. and Fem., Paraph.

(*f*) *Northey v. Northey*, 2 Atk. 77.

(*g*) *Graham v. Londonderry*, 3 Atk. 393.

(*h*) Cro. Car. 343; 1 Rolle, 911, l. 45; Com. Dig. Bar. and Fem. Paraph.; Toller's Executors, 3rd ed. p. 230, where he says, "The value makes no difference in the Court of Chancery." If so, the articles need not be suitable to the widow's degree. See 2 Atk. 77.

(*i*) *Calmady v. Calmady*, 11 Vin. Abr. 181, 21; 2 Atk. 124. In this case, a husband having a crocheat of diamonds which had belonged to his first wife, devised it to his eldest son, directing also that it should go

in succession to the heir of his family as an heir-loom. He afterwards married a second time, and converted the crocheat into a necklace, adding to it several new diamonds, the value of which was greater than the original value of the crocheat. Upon his death, the eldest son claimed the article by force of the will. But the second wife insisted on retaining it as part of her paraphernalia. The Lord Chancellor Macclesfield doubted at first whether turning the crocheat into a necklace, adding new diamonds to it, and permitting the wife to wear it, did not amount to a revocation of the bequest to the heir. But he afterwards ordered the Master to examine and separate the old from the new diamonds, and decreed the former only to the heir, leaving the widow to enjoy the new diamonds.



If a husband pawn his wife's paraphernalia as a collateral security for money borrowed, and gives power to the lender to sell for a sum certain, during his absence, this will not be deemed an absolute alienation, but shall stand as a pledge redeemable by the widow; and if the husband have left sufficient to redeem (after payment of all his debts), she is entitled to have the redemption money raised out of his personal estate (*j*). But she shall have no merely *ornamental* paraphernalia where there are not assets for the payment of debts (*k*). And if simple contract creditors are not satisfied out of the personal estate, or, by standing in the place of specialty creditors, out of the real estate, the paraphernalia shall be applied to make good the deficiency (*l*). And this even although they were presents made to the wife by the husband before marriage (*m*), and although contingent assets should afterwards fall in (*n*).

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NALIA.

She may redeem a pledge by her husband of her paraphernalia.

And may have the redemption money raised out of her husband's personal estate.

But creditors must first be satisfied.

But this will not apply to legatees; for their claims are merely voluntary; and, as observed by Lord Chancellor Macclesfield in *Tipping v. Tipping* (*o*), "Bona paraphernalia are liable to *creditors* only"; a position which accords with Lord Hardwicke's doctrine in *Graham v. Londonderry* (*p*), where he held that the widow's right to paraphernalia is superior to that of any legatee, whether general or specific.

Her rights superior to that of any legatee.

If the husband die indebted, and the widow's paraphernalia are taken by his specialty creditors in satisfaction of their demands, she will be allowed, in equity, to

Marshalling of assets in her favour.

(*j*) *Graham v. Londonderry*, 3 Atk. 393.

(*k*) Cro. Car. 346; 1 Rolle, 911, L. 50, 35; Com. Dig. Bar. and Fem. Paraph.; *Ridout v. Earl of Plymouth*, 2 Atk. 104.

(*l*) *Snelson v. Corbet*, 3 Atk. 369

(*m*) 2 Atk. 104.

(*n*) 2 P. Williams. 80.

(*o*) 1 P. Williams, 729; and see 3 Atk. 395.

(*p*) 3 Atk. 395.

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stand in their place to reimburse herself out of the real estate in possession of the heir (*q*).

With respect to the widow's claim as against a *devisee*, Mr. Jacob has a note in his edition of Roper (*r*), distinguishing the case where the devised estate is subjected to a charge or trust for the payment of debts, from the case where the devised estate is *not* so subjected. In the former case he holds the widow entitled to have the assets marshalled as against the devisee; but not in the latter case.

If not claimed by herself, paraphernalia cannot be demanded by her executor or administrator.

Paraphernalia would appear to be in so far personal to the widow, that, if she do not herself claim them in her lifetime, they cannot after her death be demanded by her executor or administrator. Accordingly, if the husband should bequeath them to her for life and then over, and she should make no election to have them *qua bona paraphernalia*, her representative, after her decease, would be excluded. (*s*).

Distinction where they are given by a husband, and where by a third person.

"There is," says a judicious writer (*t*), "a distinction upon this subject of paraphernalia, which is entitled to consideration. Where the husband, either before or after marriage, gives to his wife articles of a paraphernal nature, they are not treated as absolute gifts to her as her own separate property (*u*). But if the like articles were bestowed upon her by a father, or by a relative, or even by a stranger, before or after marriage, they would be deemed absolute gifts to her separate use; and then, if received with consent of the husband, he

(*q*) *Snelson v. Corbet*, 3 Atk. 370;  
*Tipping v. Tipping*, 1 P. Williams,  
722; *Aldrich v. Cooper*, 8 Ves. 397;  
2 Rop. 144.

(*r*) 2 Rop. 145.

(*s*) 2 Vern. 246. Com. Bar. and

Fem. Paraph.

(*t*) Story, Eq. Jurisprudence, vol. 2, p. 555.

(*u*) *Graham v. Londonderry*, 3 Atk. 393. *Ridout v. Earl of Plymouth*, 2 Atk. 104.

could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use (v).

PARAPHER-  
NALIA.

Origin of the term  
Paraphernalia.

We have borrowed the word paraphernalia from the Civilians, who themselves derived it from the Greeks. Its meaning with us, however, is very different from its more ancient signification. To understand this we must remember that, by the Roman law, the wife was not in *virī potestate*; and nothing passed to the husband by the marriage but the *Dos* or Dowry. The residue of the wife's property continued *separate property*, over which she exercised an independent dominion *non obstante matrimonio*. This separate property was called her *parapherna* or *peculium*. It was not confined, as with us, to personal necessities or ornaments. It might consist of land, or of moveables, of any description or amount. How entirely it was excluded from the husband's power appears by the following mandate of the Roman code:—"Decernimus ut vir, in his rebus quas extra dotem mulier habet, nullam habeat communionem, uxore prohibente, nec aliquam ei necessitatem imponat. Quamvis enim bonum erat mulierem, quæ seipsam marito committit, res etiam ejusdem pari arbitrio gubernari,—attamen nullo modo, muliere prohibente, virum in paraphernis se volumus immiscere" (w). Blackstone says the term signified "something over and above her dower" (x), as if she were to gain something in addition to her dower out of her husband's estate at his

(v) *Graham v. Londonderry*, 3 Atk. 393; 2 Rep. 143.

(w) Cod. v. 14. 8.

(x) Blackstone uses the word "Dower" in the legal sense, not the popular; as appears very plainly by his context. The Latin *Dos* is translated not by *Dower*, but by *Dowry*;

things not only different from, but opposite to each other. What we call Dower was unknown to the Romans. 1 Cruise's Dig. 128. See Glanville, lib. 7. c. 1., where he says, "Secundum Leges Romanas proprie appellatur Dos id quod cum muliere datur viro."

PARAPHER-  
NALIA.

The Roman paraphernalia resembled the English separate estate.

death; whereas it really meant something of her own, not surrendered by her at her marriage; something reserved and kept back from the *Dos*, or fortune, which she brought her husband (*y*). Moreover, it belonged to her as her absolute separate property *during and throughout the marriage*. Whereas the wife in England does not become entitled to her paraphernalia till the husband dies; and although he cannot bequeath them, he may sell them in his lifetime, or give them away. The citation of Roman texts, therefore, on this subject is worse than useless. In particular, the passage quoted by Mr. Roper (*z*) from an obscure commentator, misleads rather than instructs. The Roman parapherna corresponded not with the English parapherna; but it did correspond with, and seems very much to resemble the separate estate of married women in this country, invented and contrived, as we shall see hereafter, by courts of equity.

SECTION III.

WIDOW'S RIGHT  
TO CHATTELS  
REAL.

WIDOW'S RIGHT BY SURVIVORSHIP TO HER CHATTELS  
REAL.

THE widow is entitled to such of her chattels real as are found, at her husband's death, undisposed of by him in his lifetime; for the husband cannot by will dispose of his wife's chattels real (*a*).

(*y*) Paraphernalia Bona quibusvis ex rebus consistant sunt ea quæ a dote semper distincta in usum mulieribus erant, atque in earum arbitrio posita.

(*z*) Hus. & Wife, vol. 2, p.140.

(*a*) See *supra*, p. 21, et seq., section on Chattels Real.

## SECTION IV.

WIDOW'S RIGHT BY SURVIVORSHIP TO HER CHOSSES  
IN ACTION.WIDOW'S RIGHT  
TO HER CHOSSES  
IN ACTION.

I HAVE purposely reserved for this place the consideration of certain recent judicial dicta, from which it would appear that the doctrines of the common law courts respecting the widow's right by survivorship to her choses in action, are less favourable to her than those which prevail in courts of equity.

The rule in equity, as we have seen (a), is that nothing short of actual reduction into possession by the husband, or his assignee, will bar the widow's right by survivorship. The decisions of courts of equity, however, in this matter proceed not on equitable, but on *legal* grounds; for the whole of this doctrine respecting choses in action comes from the common law. In *Purdew v. Jackson*, the ruling case to which we have so often adverted, the reasoning, so far as related to the necessity of reduction into possession, was entirely *legal* reasoning. There is nothing equitable, or indeed very rational, in saying that the test of property shall depend upon an *accident*. But such being the test which the *law* prescribes, courts of equity have thought themselves bound to adhere to it.

The common law courts, however (judging from two late examples to which I am now to direct attention) do not appear to be so rigid. For in *Gaters v. Madeley* (b), the right of survivorship is held by one of the learned judges (the others not dissenting) to be defeated the moment it appears that the husband in his lifetime had

(a) *Supra*, p. 53.

(b) 6 Mee. &amp; Wel. 427.

WIDOW'S RIGHT  
TO HER CHOSSES  
IN ACTION.

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made "an election to take the chose in action to himself, and had dissented to his wife's having any interest in it." This doctrine of *election* and *dissent* is thus unfolded by Mr. Baron Parke:—

When a chose in action, such as a bond or note, is given to a femme couverte, the husband may elect to let his wife have the benefit of it; and, if in this case the husband had in his lifetime brought an action upon this note (c) in his own name, *that* would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and in that case the remedy on it survives to the wife; or he may, according to the decision in *Phillips v. Pluckwell* (d), adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her. In *Richards v. Richards* (e) the Court of Queen's Bench held that a promissory note was in the ordinary course of things a chose in action, and that there was nothing to take it out of the common rule that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession.

Now, if we rightly understand this passage, it furnishes a new test whereby to determine a change of property in the wife's chose in action. For that change is made to depend, not on reduction into possession, but on the husband's "election;" which election is sufficiently manifested by his having simply brought an action in his own name alone for its recovery; because that fact, it is said, amounts to an expression of "dissent" to his wife's having any interest in the chose in action.

But we have seen that the original right of property to her choses in action continues in the wife undivested by the marriage. That right of property must differ from all

(c) The case before the Court was one of a promissory note given to a femme couverte.

(d) 2 Mau. & Sel. 393.

(e) 2 Barn. & Adol. 447.

other rights of property if it can be altered by mere transitory intention, or by inchoate proceedings on the husband's part. The learned judge refers to no authority for his proposition; which I do not find supported by any previous case at law or in equity; and which appears altogether so new and startling that I incline to think there must be some error in the report; for a very slight variation in the language would make a substantial difference in the meaning.

WIDOW'S RIGHT  
TO HER CHOSSES  
IN ACTION.

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From the remark at the close of the passage above quoted, it would rather appear that the learned judge meant to distinguish the case of a bill of exchange or promissory note from that of other choses in action. Negotiable securities were at one time regarded as chattels personal in possession; and though they are not now so considered, but, on the contrary, are clearly held to be choses in action, they nevertheless are at the husband's absolute disposal by indorsement as we have already seen. And, therefore, the bringing an action by the husband in his own name alone, to recover payment, may in the case of a bill or note have a greater effect than the same step would produce in the case of a bond or other chose in action. But the opening of the above passage is general in its scope; for it says, "a chose in action, as a bond or note." And unless we were to suppose that *bond* was a misprint for *bill*, there would be no ground for concluding that Mr. Baron Parke contemplated a distinction between a bill or note and any other chose in action. However, it is observable that the remarks of his lordship were not strictly necessary for the determination of the case before the Court, which was one in which no action had been brought by the husband, and in which the judgment went in favour of the wife's right by survivorship.

WIDOW'S RIGHT  
TO HER CHOSES  
IN ACTION.

In *Skerrington v. Yates* (f), a more recent case than *Gaters v. Madeley*, Chief Justice Tindal said—

There can be no doubt after the case of *Gaters v. Madeley*, in which all the preceding cases were considered, that a promissory note given to the wife before her marriage is a chose in action, which the husband may reduce into possession, if he thinks fit, by bringing an action thereon in the name of himself and his wife ; but which, if not so reduced into possession, will survive to the wife. In case, therefore, an action had been brought in that form, if the husband had died before judgment, the right of action would have survived to the wife, who might, by entering a suggestion upon the roll of her husband's death, have prosecuted the suit to judgment for her own sole use. And even if judgment had been signed before the husband's death, but no execution levied, the benefit of the judgment would have survived to the wife.

This seems to intimate that, if the action had been brought on the note in the name of the husband alone, the wife's survivorship would, in the opinion of the Chief Justice, have been cut off, although the husband were to die before judgment. And this upon the principle of election and dissent established by the simple fact of omitting the wife's name as a co-plaintiff in the action.

If these dicta should be followed, it might be well to consider and define what they precisely mean. Reduction into possession is not a figure of speech ; and the institution of a suit, in the husband's name alone, is not reduction into possession. Since, therefore, it is not the thing itself, it must operate (if it is to operate) as an *equivalent*. Then is it to be said that it shall be the *only* equivalent? Why should not other evidences of election and dissent be admitted? What better proof could be required than an assignment executed for valuable consideration by the husband? The evidence of election and dissent was abundant and redundant in *Purdew v. Jackson*. But the

(f) 12 Mee. & Wel. 855.



able counsel by whom that case was argued (who were not likely to omit any topic calculated to benefit their client) no where suggested that the husband, by a mere expression of dissent could put an end to the wife's legal rights of property. In *Purdew v. Jackson*, however, it may be said that the chose in action was reversionary. But the reasoning on which the Court proceeded in that case, as well as in the subsequent cases already adverted to (*g*), of *Ashby v. Ashby*, *Hutchings v. Smith*, *Ellison v. Elwyn*, and *Le Vasseur v. Scrutton*, was expressly applicable to choses capable of reduction into possession at the moment of the assignment. And in *Purdew v. Jackson* it was stated that nothing turned upon the circumstance of the chose being reversionary.

WIDOW'S RIGHT  
TO HER CHOSSES  
IN ACTION.

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On the whole, then, it would seem that the views of the common law and equity tribunals, on this subject, are not altogether concurrent.

This section I will conclude by observing, that causes of action, which had accrued during the coverture, in respect of the wife's real estate, or in respect of any personal wrongs done her, survive to her on the death of her husband (*h*).

(*g*) See *supra*, pp. 57, 58.

(*h*) *Woodman v. Chapman*, 1 Camp. 189, note.

## SECTION V.

## DOWER.

## DOWER.

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Antiquity and  
universality of  
right.

THE law of primogeniture, by which land on the father's death goes exclusively to the eldest son, was qualified, from the earliest times, by allowing a third to the widow for life, not only to support herself, but also for the nurture, maintenance, and education of the younger children. This was called her dower; than which, in its simple original state, no right known to the law could well be deemed more reasonable and just. It was, in fact, an indispensable social institution, universally adopted under the feudal system. Insomuch that dower, or something

analogous to it, by whatever name distinguished, was recognised, enforced, and protected in all parts of Europe.

DOWER.

But however respectable in its origin and useful in its objects, this ancient right became, in process of time, inconvenient (a); a result in nowise attributable to any inherent property or quality in the thing itself, but brought about, I apprehend, entirely by the unhappy rulings of the judges, who in former ages administered the law, and sometimes made it.

How it proved inconvenient.

Thus to begin with their first great error (the parent of the rest) they did not admit dower out of trust or equitable estates. They were equally stiff as to the husband's curtesy. Why the Court of Chancery afterwards allowed curtesy, but refused dower, out of trust or equitable estates (another anomaly of our judicial system), admits of easy explanation. Uses, before the statute (b), gave no right either to curtesy or dower. So said the judges; for the common law regarded nothing but the *legal* title; and equity, at that time, was feeble and imperfect. After the statute, trusts were deemed the same thing as uses had been before the statute. Dower, accordingly, did not arise upon them. So that when the husband's estate was merely equitable, he could sell and alienate it without his wife's concurrence, and the purchaser's title was unincumbered by dower. So many sales had been effected on this assumption, that when the Court of Chancery came, at last, under the administration of a succession of great men, to understand the proper functions of equity, it was too late to interfere.

Not admitted out of trusts.

Why curtesy of trusts allowed, but dower of trusts refused.

But no such impediments existed to prevent its interposition in the case of curtesy. There were, and there could have been, no sales of the *wife's* estate, without the

(a) I here use the conveyancers' expression.

(b) Statute of Uses, 27 Hen. 8, c. 10.

**DOWER.**

husband's concurrence. Consequently, equity experienced no difficulty in awarding curtesy out of trust or equitable estates, which it did by an exercise of its corrective jurisdiction. The same reasons, indeed, applied with equal force in the case of dower; but from the number of transactions concluded and founded upon a contrary principle, and the hazard of disturbing titles, it was thought that the extraordinary remedies of the Court of Chancery might, with respect to dower after such a lapse of time, do more harm than good. The consequence was that dower was left to stand on its ancient footing under the common law, by which trust, or equitable estates, were not recognised.

This seems to solve what to students (who love consistency) has always appeared a revolting incongruity in the law of dower.

The next unfortunate miscarriage of the Courts, with respect to dower, shows how little the judges formerly thought of accommodating the operation of our institutions to the altered and constantly changing circumstances of the times. Thus, when the country had become commercial, and land began to be transferred, by sales and purchases, from hand to hand, it was held that notwithstanding such alienations, dower attached precisely in the same way as if the possession had stood in the husband at the date of the marriage, and had continued in him undivested until the moment of his death. Hence, if a man had chanced, during the coverture, to be "a great buyer of land," his widow would have been dowable out of it all, though resold in his lifetime, and made over to a stranger for valuable consideration.

Dower held to attach where the estate had been conveyed to a bona fide purchaser.

Devices of the conveyancers.

The decisions of the Courts so ruling set the conveyancers to work; and these artists devised many ingenious and laudable contrivances to evade or to defeat the injustice of the law. Accordingly, we have, among other

expedients, the celebrated "conveyance to uses to bar dower;" which, of all their inventions, was the most happy and successful. It was, indeed, a great triumph of conveyancing; and deserves the praise which the lovers of technical erudition have invariably bestowed upon it.

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The true course would have been, to admit dower out of trust or equitable estates, but to discriminate between property possessed by the husband at the date of the marriage, and property afterwards acquired by him. Had this distinction been attended to, and had a Mansfield always presided in the Courts, we may safely assume that dower would have been kept within its proper bounds, so as on the one hand to do no harm, and on the other to sustain no damage. This, however, was not doomed to be its fate; for a "practice" established by the conveyancers, whom we have commended, and a decision, delivered upon great consideration, about the close of the seventeenth century, gave a shock to this right from which it never afterwards recovered.

To make our meaning plain, we must observe that the conveyancers aforesaid, in their great eagerness to protect purchasers, went further than the exigencies of the case or the claims of solid justice required.

Thus the right to dower at *law* attached only where the husband had been legally seised of the estate. But if he were beneficially interested, the widow would be entitled, upon the principles of equity, to her dower, just as much as if her husband had been legally seised. For equity would not require a legal seisin to found the widow's title. Therefore, if a man had purchased from the husband an estate, out of which he then knew that the wife had a right to dower, he ought not to have been permitted to exclude her by afterwards getting in

Their practice  
respecting pur-  
chasers with  
notice of dower.

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the legal estate. The conveyancers; however (at a period when the doctrine of equitable notice was less matured than at present), had arrived at a sort of matured conventional understanding with each other, that if a purchaser, though fixed at the time of the transaction with perfect knowledge of the right to dower, could afterwards manage, by any means, to get an assignment of an outstanding term, the widow's dower, on the faith of which she had perhaps entered into matrimony, would be displaced. This was giving a purchaser, who had bought with full knowledge of the widow's title, the same advantage as if he had been ignorant of it; and was contradicting a cardinal maxim of equity, that no one shall be allowed to make an unconscientious use even of his legal rights; a maxim which ought to be universal, but was excluded in the case of dower by reason of this "practice," which, Lord Eldon (c) tells us, had become "inveterate" among conveyancers; and which could not be overturned without shaking the security of titles. The judgment of the House of Peers, so holding, was pronounced, with great reluctance, under the advice of Lord Chancellor Somers in the famous case of *Lady Radnor v. Vandebendy*, the circumstances of which are thus summed up by Mr. Cruise (d):—

Decision of the  
Lords affirming  
that practice.

Lady Radnor's husband was seised in tail of the lands in question. But there was a term of ninety-nine years prior to his estate, created for the performance of several trusts in the Earl of Warwick's will (all which were performed), and after, in trust to attend the inheritance. Lord Radnor having barred the entail, sold the estate to Vandebendy, and assigned the term to a trustee for him. After the death of Lord Radnor, his widow recovered dower, with a *cessat executio* during

(c) *Maundrell v. Maundrell*, 10 Ves. 272.

(d) Cruise's Digest, tit. Trust.

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the term, and brought her bill in the Court of Chancery to have the term removed, that she might have the benefit of her judgment at law. Lord C. Jeffries inclined to give relief (e); but Lord Somers held that, this being against a purchaser, equity ought not to give any relief, and dismissed the bill. On an appeal to the House of Lords, it was argued for Lady Radnor, that equity entitled her to the third of this term; that a tenant by the courtesy would be entitled to it, and by the same reason a tenant in dower; that the term was to attend all the estates created by Lord Warwick's will, and in trust for such persons as should claim under it, which the appellant did, as well as the respondent; that the purchaser had notice of the incumbrance of dower, the vendor being married when he sold the estate; and that Lady Radnor claimed under her husband, who had the benefit of the whole trust. On the other side it was said, that dower was an interest or right at the common law only; that no title could be maintained to dower, but where the common law gave it; and if a term were in being, no woman was ever let in until after the determination of that term. That this was the first pretence set up for dower in equity (f). The right was only to the

(e) This verifies the remark of Jeffries' biographer, that as a judge, notwithstanding all his failings and profligacy, this chancellor evinced ability in the decision of *private* causes, and a *strong love of justice*. (Lord Campbell's *Chancery*, Life of Lord Jeffries.) Lord Somers, on the re-hearing, was overborne by a consideration of the evil which would ensue from putting titles in jeopardy; while the Lords on the appeal, after discovering an almost unanimous disposition to reverse the decree, put it to Lady Radnor's counsel to say, whether the practice and understanding of conveyancers was not as alleged on the other side, to which, being thus appealed to, they frankly acknowledged that it was so; and upon that ground alone the house, with the chancellor, Lord Somers, at their head, affirmed the decree, which thereby settled that

purchasers should be unaffected by notice in the case of dower; although in all other cases it would exclude them; for which distinction, in spite of the ingenuity shown to devise reasons, none other can truly be given but that *the conveyancers would have it so*.

(f) Lord Nottingham, upwards of thirty years before this argument, had established the maxim, that equity, in dealing with titles to land, follows the law. Wherever, therefore, supposing the estate to have been legal, the law would have given dower, equity ought to give it where the estate was equitable. This wise and necessary analogy seems to have been overlooked in *Radnor v. Vandebendy*. Better, therefore, had it been for the law as well as justice that the Lords had not yielded to the pressure of a "practice," which, after all, was but *communis error*.

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thirds of the rent reserved on any term. That it had always been the opinion of conveyancers, that a term or statute prevented dower; and that the consequence of an alteration would be much more dangerous than the continuance of the old rules. The decree was affirmed.

Upon this decision Mr. Cruise justly observes, that the doctrine established by it

Remarks on that decision.

Is contrary to the general principles of equity, which has never extended its protection in any other instance to purchasers with notice of incumbrances. The true and only reason on which it was founded was the silent, uniform course of practice, uninterrupted, but at the same time unsupported, by legal decisions; an opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower; and many estates having been purchased under this opinion.

It was afterwards decided that mortgagees were within the same privilege. But it was not allowed to extend to volunteers; for example, to heirs. In such cases, if there were a satisfied term outstanding, the widow might come into equity to have it put out of the way, so as to give her the benefit of dower (g).

Late Dower act.

After this recapitulation, we may the better appreciate the provisions of the late statute (3 & 4 Will. 4, c. 105) intituled "An Act for the Amendment of the Law relating to Dower" (h); upon which (notwithstanding our respect for the learning and ability of its framers) it will be difficult to bestow unqualified approbation.

The act takes effect from the 1st of January, 1834.

Analysis of its sections.

Its opening and principal section provides that widows shall be entitled to dower out of trust or equitable estates. So that, if the husband die beneficially interested in any

(g) *Swannock v. Lifford*, 2 Atk. 208.

(h) See Appendix, No. 2, where the act is set out at length.



land, the widow, although not dowable at law, will under this statute be entitled to dower in equity.

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Here, therefore, we have the law established precisely as it would have stood had the Court of Chancery two centuries ago allowed dower, instead of refusing it, out of trust or equitable estates. And it is only to be regretted that an enactment so proper should so long have been delayed. What the Court by its decree could not do without disturbing the security of titles, has been done at last by an act of the legislature, which (being expressly declared to have no retrospective operation) regulates the right of dower for the future, but leaves the former law to govern all previous transactions.

Widow now dowable out of trust estates.

The statute next (by its third section) gives dower to the widow where the husband had merely a right of entry, or of action, for the recovery of the land.

But by the fourth section it is enacted that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will." So that the widow's dower—on the faith, peradventure, of which she has married—is by this clause put under the absolute power of the husband, to sustain, to abridge, to mutilate, or to destroy. No wife, therefore, can be safe under this law, unless she have had a settlement. Whether *that* is a fit rule for an enlightened people to adopt in the most important of all contracts, I leave others to discuss; only observing that if husbands were uniformly wise, just, and generous, the enactment might pass without comment. Looking, however, at the world as it is; remembering that husbands are occasionally apt to be improvident, thoughtless, capricious; that they sometimes even quarrel with their wives, and upon slender grounds; that they are not always free from sinister

Dower placed entirely in husband's power.

Remarks on that provision.

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influences, especially in their languishing and dying moments; and finally, adverting to the great power which the law gives them in other respects over the wife's property and person; this provision of the act does seem, upon the whole, one of the most unsatisfactory and inexplicable in modern legislation (i).

It is true that in this way what conveyancers call the "troublesome nature of dower" (j) is most effectually got rid of. But one would think this object might have been sufficiently attained without furnishing facilities for the commission of injustice. A distinction ought surely to have been made between property which was in the husband's visible enjoyment at the date of the marriage (relying upon which the woman is supposed to have

(i) A learned friend (than whom there is none more conversant with the law of real property), adverting to the new enactments respecting dower, says, "The wife's estate may be defeated by the husband; and even without an expressed intention on his part, her interest is postponed in favour of his debts and incumbrances. There is, however, a good deal to be said for the late alterations. In early times land was the property most regarded, and looked to as that which should supply a livelihood for the owner's widow. But when it was decided that dower could not be had of a trust estate, and when effect was given to legal limitations invented for the purpose of preventing dower, the old provision for a widow could not be relied upon. Besides, as personal property increased, and was made available for family purposes,

settlements of it supplied more convenient resources. And though the interests of married women in their husbands' lands had been greatly affected, yet the contrivance of provisions for their separate use gave them a solid advantage, and enabled them to have funds safe from their husbands' power, and appropriated for their own enjoyment and disposition; arrangements hardly known or thought of when dower was in its vigour." This is all very just; but it leaves untouched the question whether a woman marrying under a law which tells her that she is dowerable of her husband's estate, ought to be left subject to the risk of starvation in every case where she has no separate property, and where she omits, before her marriage, to call in the aid of a synod of conveyancers.

(j) Williams, Real Prop. 176.

entered into matrimony), and property afterwards acquired by him, over which her claim to dower is by no means so strong. The neglect to attend to this obvious distinction was the great blunder of the judges in former ages; and this but increases our amazement that it should have been overlooked by the legislature so very close upon the middle of the nineteenth century.

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Under this clause, a husband's contract to sell (although no conveyance be executed) will bar the right to dower; upon the principle that what is agreed to be done shall be considered in equity as performed (*k*).

The fifth section of the act enacts that all partial estates and interests, and all charges, debts, incumbrances, contracts, and engagements, to which the husband's land may happen to be subject, shall exclude the right to dower.

Subsequent sections.

The sixth section enacts that dower may be barred, either by a declaration in any deed conveying land to the husband, or in any deed which he himself at any time may choose to execute.

The seventh section enacts that when the husband dies partially or even wholly intestate, the widow's claim may be barred by a simple declaration of his intention that she shall not be dowable out of his land.

The eighth section enacts that dower shall be subject to any conditions, restrictions, or directions, that may be declared by the will of her husband.

The ninth section enacts that any devise made by the husband to the wife of real estate subject to dower, shall bar her claim to dower, unless a contrary intention appear in the will.

The tenth section enacts that no gift, or bequest, made by the husband out of personalty or out of land not subject

(*k*) But see remark on the eleventh section of the Act, *infra*, p. 168.

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Courts of equity may still enforce covenants not to bar dower.

to dower, shall prejudice the widow's claim, unless a contrary intention appear in the husband's will.

The eleventh section enacts that courts of equity shall still be at liberty to enforce all covenants and agreements interdicting the husband from barring the widow's dower.

Wherever, therefore, a husband sells an estate, the purchaser should ascertain that there has been no covenant or agreement preventing the seller from barring the wife's right to dower. How the fact stands, it will not always be easy to find out; and sometimes the discovery may be beyond the reach of any diligence that a purchaser can exercise (l).

Legacies in satisfaction of dower preferable.

The twelfth section enacts that the rules by which legacies given in satisfaction of dower are held preferable to other legacies, shall not be interfered with (m).

Dower ad ostium ecclesie and ex assensu patrie.

The thirteenth and last operative section enacts that there shall be no such thing hereafter as dower ad ostium ecclesie, or dower ex assensu patrie.

At the close of this summary I cannot do better than

(l) The purchaser, however, may be protected by having the legal estate, and by want of notice. In *Jones v. Smith*, 2 Phill. 244, a mortgagee was told that there was a settlement, but was also told that the particular estate was not included in it, and he advanced his money without seeing the settlement; yet the Court refused to interfere against him. If, however, a purchaser chooses to take a mere equitable estate, he may incur danger. Even a *parole ante-nuptial* agreement, interdicting a husband from barring a wife's dower, might possibly be enforced, although evidenced only by a document signed *after* the marriage. See the reasoning in *Hammerley v. De Biel*, 12 Cl. & Fin.

45; and in particular the remarks of Lord Cottenham, both in the Court below and in the House of Lords.

(m) A legacy to a widow, in lieu of dower, has no priority over other legacies, where the testator leaves no real estate.—*Acey v. Simpson*, 5 Beav. 35. The usual rule is in favour of the widow. Here it was insisted that she was not a purchaser, as there were no real estates for her to release of dower. This view was adopted by Lord Langdale. It is because she releases dower that she has the preference.—1 P. Wms. 127; Amb. 244. But this cannot apply where there is no realty, as was the case in *Acey v. Simpson*.

quote the following judicious remarks of Mr. Williams on this act, in his useful book on the principles of Real Property (n).

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General effect of the act.

The effect of the act is evidently to deprive the wife of her dower except as against her husband's heir at law. If the husband should die intestate and possessed of any lands, the wife's dower out of such lands is still left her for her support—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has unfortunately found its way as a sort of common form into many purchase deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and far superior if the heir be a lineal ancestor or a remote relation (o). The proper method seems, therefore, to be to omit any such declarations against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them.

To establish the widow's right to dower it seems superfluous to say that she must previously have been the lawful wife of her deceased husband. Yet this is much insisted upon by Mr. Roper (p), who gravely informs us that the husband's second marriage during the life of his first wife will not entitle the second widow to dower; to which he adds another proposition equally self-evident, namely, that if a wife take a second husband before her first husband dies, she will not be dowable out of the second husband's estate.

To establish right to dower there must have been a valid marriage.

Under the former law there was a distinction which deserves to be noticed, although it has recently been abolished by Lord Lyndhurst's statute (q). If a marriage

Change in this respect by Lord Lyndhurst's act.

(n) P. 176. See also the more authoritative comments of Sir Edward Sugden (Vend. & Pur.), which I would quote if I had access to them

where I now write.

(o) 2 Sugd., Vend. & Pur. 222.

(p) 1 Rep. 333.

(q) 5 & 6 Will. 4, c. 54.

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were contracted within the forbidden levitical degrees, it could not be set aside after the death of either party. If, therefore, it continued unimpeached during the husband's life, the right to dower would on his death be effective. This was the ancient law; but all such marriages, formerly voidable only, are now absolute nullities, and can generate no right whatever.

The widow need not have had issue.

We have seen that the husband's right of curtesy does not arise unless he has had living issue by his wife, capable of inheriting her estate. Of this the widow's dower is not a literal counterpart. For she does not require actually to have had issue by her husband. But she must have been in such a situation that "she might have had issue who might have inherited." So says the law; and it is idle to hunt for reasons.

Out of what dower may be claimed.

Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty; as rents, estovers, commons, advowsons, fairs, profits of courts, tithes, woods, mills, piscaries, tolls arising from public navigable rivers, and the like (r).

Mines worked in husband's lifetime.

The widow likewise is dowable of mines and minerals worked in the husband's lifetime; but not of mines unopened (s).

Case of an annuity to husband and his heirs.

She is not dowable of a mere annuity granted to the husband and his heirs; because *that* is a personal demand, not issuing out of any lands or tenements (t).

Crops of corn and grain.

It is a maxim that the widow shall be endowed *de optimâ possessione viri*. If, therefore, lands which had been sown with corn and grain by the husband be assigned to her for dower by the heir, she will be entitled to the crops (u).

(r) 1 Rep. 342.

(t) *Earl of Stafford v. Buckley*,

(s) *Stoughton v. Leigh*, 1 Taunt.

2 Ves. Sen. 170.

402.

(u) 1 Rep. 350.

She is also entitled to emblements, and may dispose of them (v). DOWER.

On the other hand, as a tenant for life, she is liable for all waste committed by herself, or by strangers (w). Emblements.

How far she is answerable for letting the buildings fall into decay does not appear to have been the subject of any authoritative resolution. Liable for waste.

It would seem that she is clearly liable to one-third of the duties attaching to the estate; upon which principle she must contribute her proportion to keep down interests (x). And this much of dower; an interest now of less consequence than heretofore, and rather to be regarded as a ruin of former times than a subsisting reality. Bond to keep down interest.

## SECTION VI.

## WIFE'S EQUITY OF REDEMPTION AND EXONERATION.

WIFE'S EQUITY  
OF REDEMP-  
TION.

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As before observed (a), upon mortgages of the wife's estate, executed by her husband and herself during the Her equity to redeem her real estate.

(v) 1 Rep. 426.

(x) 1 Rep. 371, 376.

(w) Co. Litt. 53, 54; 2 Inst. 303.

(a) Supra, p. 34.

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OF REDEMPTION.

coverture, it will in general be construed that the equity of redemption remains in the wife and her heirs. Accordingly, when the marriage is dissolved by the death of the husband, his widow, and her heirs after her, are entitled to put this equity in operation, unless it appear clearly that it was transferred by some sufficient act done in the marriage state.

Where reserved to the husband a resulting trust for the wife will be raised.

It must therefore be made quite manifest that a *change of property* was intended, before the wife can be excluded. Thus, where an estate belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the Court held that there was a resulting trust for the wife and her heirs (b). In another case, a husband having married a widow who had an estate in fee under the will of her former husband, procured her to join him in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs; without recital in the deed of anything special, to show that it was intended to make a new settlement of the estate. It was decreed that the equity of redemption had not been taken out of the wife; and, consequently, (she having died), that her son by her first marriage was entitled to it (c).

The husband will only have the equity *jure uxoris*.

The rule, then, being that, where husband and wife mortgage the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without recital of special circumstances to show an intention to make a new settlement of the estate, the husband has the equity of redemption only *jure uxoris* (d).

Mere form of the reservation immaterial.

"And in considering this question," says Lord Redesdale, "the mere form of the reservation of the equity of redemption will not of itself be held sufficient to alter the

(b) 1 Bli. 115.

(c) *Ruscombe v. Hare*, 6 Dow. 1.

(d) *Id.*



previous title. In such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage" (e).

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OF REDEMPTION.

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"But if it clearly appear to have been the intention of the wife that the husband should have the equity of redemption, he *must* have it" (f).

But if a change  
were really in-  
tended, effect  
must be given  
to it.

Wherever, therefore, the transaction, importing more than a mere mortgage security, gives satisfactory evidence of an intention to effect a change of the beneficial interest—the husband and his heirs, and not the widow or her heirs, will be entitled to the equity of redemption (g).

The law on this subject was deeply considered and learnedly discussed in the case of *Jackson v. Innes*, where the decree of Lord Eldon, in the Court of Chancery, was, on the motion of Lord Redesdale, (and with the assent of Lord Eldon himself), reversed by the House of Peers. The remarks of Lord Redesdale, in moving for judgment, have furnished the rule which now governs the profession in transactions of this nature. The collection of reports in which those remarks are to be found have (but not from want of merit and utility) a narrow circulation. I therefore extract from them the following passages, which are the most material of Lord Redesdale's address; premising, however, that the case was one in which the Lords were of opinion that there was evidence of an intention to change the beneficial interest in the wife's property; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and, consequently, that the husband and his heirs, and not the heirs of the wife, (who had predeceased her husband), were entitled to the equity of redemption:—

*Jackson v. Innes.*

(e) Per Lord Redesdale, in *Jackson v. Hare*, 6 Dow. 1.  
*v. Jones*, 1 Bli. 115.

(g) *Jackson v. Innes*, 1 Bli. 104.

(f) Per Lord Eldon, in *Ruscombe*

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OF REDEMPTION.Remarks of Lord  
Redesdale.

(h) It is highly important, in all cases, that the principles of decisions should be known and uniform, that professional persons may be able to advise with safety. In a case of this kind, a purchaser acting under a misconception of his legal adviser, found that his title was deficient. That was the case of *Ruscombe v. Hare* (i), in which the doctrine of resulting trust was held applicable. In the present case, it is alleged that there is a distinct ground, *scil.*, of fraud, to annul the limitation to the husband. But no such ground is recognised by the decree, or established in evidence. The only question, therefore, which is now presented for the consideration of the House is, whether the decree is founded upon the principle which regulated former decisions, and was established by the judgment of this House, upon the appeal in the case of *Ruscombe v. Hare*.

The case of *Broad v. Broad* (k) was the first in which the doctrine was applied. In Eq. Ca. Abr. 62, it is laid down as a general principle, that where money is borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption by the mortgage deed is reserved to the husband and his heirs; yet the wife shall redeem, and not the heir of the husband; and for authority, reference is made to the case of *Broad v. Broad*. According to the facts of that case, to be collected from the reports, T. B., the husband of the plaintiff in the suit, settled certain houses in Bread Street, London, to the use of himself for life, remainder to the plaintiff for life for her jointure. These houses were burnt down in the Great Fire in 1666. In order to rebuild them, the husband borrowed 600*l.*, and a fine was levied by husband and wife to the lender for ninety-nine years, who re-demised the premises to the husband for ninety-eight years, rendering 36*l.* per annum, and binding himself to repay the 600*l.* at a time, &c. The husband had agreed with the wife that she should have the redemption, paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself, in tail to the heirs male of his body—the remainder in tail to his brother, (who was defendant in the suit), charged with portions of 3000*l.* to his daughters. He died, making his brother, the defendant, his executor; and his personal estate was not sufficient to pay his debts. The defendant had executed a bond upon which he was liable

(h) It is evident that these remarks of Lord Redesdale were taken down, not by Mr. Bligh, but by Mr. Gurney, the sworn short-hand writer

appointed by the House of Lords.

(i) 5 Dow. 1.

(k) Eq. Ca. Abr. 316.

LORD REDES-  
DALE'S RE-  
MARKS IN  
JACKSON v.  
INNES.

as surety for his deceased brother to the amount of 1600*l.*, which he satisfied, and also paid the interest of the 800*l.* borrowed, until 1681, when the plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the plaintiff's title was but a parol agreement between husband and wife; and that he (the defendant) had no notice of the agreement until the filing of the bill. It was decreed, that the plaintiff should have the redemption, paying a third part of the principal, but should have no profits received by the defendant until the filing of the bill in 1681, when he first had notice of the agreement. The decree therefore, which was made upon the original hearing, proceeded entirely upon the foundation of the agreement. A bill of review having been afterwards filed, suggesting that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved,—Lord North, then Keeper, admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her when the mortgage was paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

That was the first case in which the principle was established. It has ever since been adopted and referred to in all subsequent cases, up to the late decision in *Ruscombe v. Hare*. The rule fixed by those cases is no more than this,—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Courts hold that no alteration of the previous rights of the parties is affected. But it is an exception to that rule, where other circumstances occur, affording evidence of an intended alteration of rights.

In *Rowell v. Whalley* (1) the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, &c., paid to the mortgagee, his executors, &c., the sum borrowed, the fine to be levied according to a covenant contained in the deed

(1) 1 Chan. Rep. 116.

WIFE'S EQUITY  
OF REDEMPTION.

should enure to the husband and wife, and the longest liver of them ; with remainder to the right heirs of the husband for ever. Here is a case of a distinct declaration, in no manner depending upon the proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage. A fine was afterwards levied, according to the agreement among the parties ; and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband, being a party defendant in the suit, was an infant. The Court decreed, that the plaintiff and the infant should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating the estate for the life of the plaintiff in the premises at one third, and the reversion in fee of the infant at two thirds. In that case it was determined that the subsequent declaration and limitation, having no connexion with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment, the distinction is stronger ; for it is the mortgage term which is made redeemable by the husband and wife ; and the fee is the subject of the settlement.

In the case of *The Earl of Huntingdon v. The Countess of Huntingdon* (m) the mortgage was made by the mother of the plaintiff joining with her husband, of lands, being her inheritance ; and the purpose was to raise money for the husband to pay for the place of captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess (the plaintiff's mother) for life, remainder to the plaintiff in tail ; the proviso for redemption being, that on payment of the mortgage money the term should cease. In 1683 the Countess joined with her husband in an assignment of the mortgage ; and in the deed of assignment the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they or either of them should direct or appoint. The husband afterwards paid off the mortgage, and took an assignment of the term in trust for himself, and by will bequeathed his personal estate to his second wife (the defendant), who claimed the term. The plaintiff (son of the first wife) filed a bill in Chancery, praying that the term might be assigned to him. The Lord Keeper

refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal to Parliament (n) the decree was reversed; and the term directed to be assigned to the appellant, with an account of the profits from the death of the appellant's mother, making to the respondent just allowances for the maintenance of the appellant, and management of the estate. In that case, the limitation, after the life estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife, and the heirs of their bodies; or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the Earl of Huntingdon's case was, that on payment by either of them the term should be assigned as they or either of them should direct. Under these circumstances, the executrix and devisee of the husband insisted that, as he had paid the mortgage, and taken the assignment, it belonged to her as his representative. The son of the former wife contended, that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest: and it was held, as to the term assigned to the husband, and possessed under his will by the defendant, that there was a *resulting trust for the son*.

LORD REDESDALE'S REMARKS IN  
JACKSON v.  
INNES.

In the case of *Jackson v. Parker* (o), which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and in order to make a security, by mortgage of his own estate, his wife joined in a fine, which would have had the effect of barring her of any claim to dower. The limitation of the equity of redemption was to the husband and the wife, and their heirs; and there was a declaration in the deed, that, after payment of the money lent on the mortgage, the fine should enure to the husband and his heirs. Other charges were afterwards made upon the estate, and those subsequent charges were all made redeemable by the husband and wife, and their heirs. The husband by his will made a disposition of this property, in trust to raise provisions for all his children. But the will was disputed by the eldest son and heir-at-law, upon the ground, that it was a devise of the equity of redemption, of which the husband was not sole seised; because the equity of redemption was reserved to the husband and wife, and their heirs. Sir

(n) Bro. P. C. 1; Journals of the House of Lords, vol. xvii. p. 236.

(o) Amb. 687.

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OF REDEMPTION.

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Thomas Sewell decided that upon a contest for redemption the Court would regard the ownership of the estate previous to the mortgage; and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband. In such case she would have been entitled to have had the estate redeemed for the purpose of letting in her dower; but there her right ended. In that case it was argued, "That the Court will put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made. The husband was the owner of the estate, and the intention of the deed was merely to make a mortgage, and the wife was made a party and joined in the fine, for the sake of the mortgagee." And this argument was adopted by the judgment.

In the case of *Corbett v. Barker* (p), according to the report, the Court do not seem to have had the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe v. Hare*; and they dismissed the bill. In that case, it appears probable that Baron Thomson doubted the correctness of the decision; for he says, "That a reservation of the kind now under discussion, in a fine levied completely *diverso intuitu*, shall not, without an express declaration of such an intention, carry the estate in a new channel." The cause being afterwards reheard, the Court seems to have been of opinion, that a trust resulted in favour of the original owner of the estate, and determined accordingly. The report of the case is so very imperfect in its language and statements, that it is difficult to discover what were the facts of the case, and the point decided; but, as far as they can be collected, the case appears to have been of the same nature as *Broad v. Broad*, and the other cases which have been decided upon a similar principle.

It must be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any

ambiguity ; that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me that the operation of the deed as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption ; but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the repayment of the money lent ; and when the mortgage should be discharged the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was, by declaring that, upon payment of the money due, the term should cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connection whatsoever with the existence of a term, which then would have ceased to exist. A Court of Equity will so deal with a declaration that upon payment of a sum of money on a given day the term shall cease, that although the term becomes absolute by nonpayment of the money at the day, it is still subject to redemption. By whom it may be redeemed must be discovered from the title, which by the deed itself is declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself declaring who were the persons entitled to the estate.

In all the cases decided upon the general principle, the grounds of the decision were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in this case, there is no ground to raise such imputations. For the deed is clear and express in its declarations and provisions. The case is really in principle, if not in circumstances, the same as the case of *Rowell v. Whalley*.

Upon these grounds it appears to me that the part of this decree which declares that the appellant was a trustee of the equity of

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LORD REDESDALE'S REMARKS IN  
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OF REDEMPTION.Lord Eldon's  
remarks.

redemption is not according to law. I shall move simply to reverse this decree.

*The Lord Chancellor Eldon.*—The circumstances of this case are certainly, in point of fact, much better understood than they were; and much greater research has been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It does, however, occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported; and therefore I am of opinion that the decree must be reversed.

Decree reversed accordingly (q).

(q) The case of *Jackson v. Innes* is remarkable as being the only instance in which a judgment of Lord Eldon's was reversed. Great as that lawyer unquestionably was, the preceding exposition will convince us that he did not enjoy without a rival, the eminence which was unquestionably his due. Lord Redesdale, after having discharged the judicial duties of the Great Seal in Ireland with consummate ability for a period of four years, retired on the appointment of the Whig ministry in 1806. There was nothing odd in this. But when his friends returned to power, in 1807, the odd thing was, that they kept Lord Redesdale at home without office, and sent Lord Manners in his stead to be Chancellor of Ireland. The subsequent years of his life (a very long one) were, however, not lost to

the profession. He sat regularly in the House of Peers, advising their Lordships on all appeals and writs of error, and other judicial business. In learning, it is hard to say that he was not equal to Lord Eldon. He had powers of exposition too; and excelled as a legal writer. In the judgments of Lord Redesdale we see general rules luminously descanted upon; for this great master of equity had a just confidence in himself, and never frittered away his meaning by timid and dexterous qualifications. He committed himself generously and boldly to all his propositions, for he knew and felt that they had a foundation of granite. Herein lay his superiority over Lord Eldon, who scarcely ever tied himself down to anything beyond the decision of the particular case before him.



In *Reeve v. Hicks* (r), Sir John Leach held that a widow was entitled to redeem her copyholds which had been charged during the coverture; but with respect to her freeholds, which had been also charged on the same occasion, the circumstances were as follow, namely—that the husband and wife had mortgaged them for a thousand years, reserving the power to redeem to them or either of them; and they likewise covenanted to levy a fine to the mortgagee for the term, and, subject thereto, to *the husband and his heirs and assigns for ever*. A fine was duly levied pursuant to the covenant; and the husband subsequently released his equity of redemption to the mortgagee in fee, who entered into possession. His Honour observed that “the case was not distinguishable in principle from that of *Jackson v. Innes*. The limitation of the uses of the fine had no connexion with the purposes of the mortgage, or the proviso of redemption, *but was altogether a new settlement*.” The widow, therefore, was not allowed to redeem, for she had by her own act, and in a legal manner, not merely mortgaged her estate for her husband’s debt, but actually transferred the entire beneficial interest out and out from herself and her heirs to her husband and *his* heirs; a result which the Court will in general be reluctant to admit, but which it cannot in the face of strong acts and expressions exclude; for there is no reason in law or equity why a wife should not, if so minded, convey her estate to her husband.

WIFE'S EQUITY  
OF REDEMPTION.

*Reeve v. Hicks.*

The widow has also a right in equity to have her estate exonerated out of her husband’s assets. This equity is put upon the principle that she is considered, when mortgaging her property for her husband’s debt, to stand in the attitude of a *surety*; from whence it follows that she must be

Wife's equity of  
exoneration.

WIFE'S EQUITY  
OF EXONERA-  
TION.Treated as a  
surety.

invested with the usual privileges of that character,—the first of which is indemnity from the principal for whose benefit her security was interposed.

Thus we have it laid down by Lord Hardwicke with his accustomed clearness, that

It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After his death she is entitled to have her real estate exonerated out of his personal and real assets ; the Court considering her estate only as a surety for his debt (*s*).

She is entitled to  
stand in the place  
of the mortgagee.

The same great Judge, in *Parteriche v. Powlet* (*t*), says that the wife paying her husband's mortgage debt by a loan of money out of her separate estate, is as much entitled to stand in the place of the mortgagee as if she were a stranger ; adding also, that if she joins with him in charging her estate, she is, in like manner, entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. Hence it follows, as indeed Lord Hardwicke declared in *Robinson v. Gee* (*u*), already cited, that the other creditors of the husband cannot stand in the place of the mortgagee against her (*x*). So that they are entitled to no preference over her in the administration of his assets.

Husband's other  
creditors have no  
preference over  
her.

(*s*) *Robinson v. Gee*, 1 Ves. Sen. 252.

(*t*) 2 Atk. 384.

(*u*) Ubi supra.

(*x*) The words of Lord Hardwicke

are : "None of his (the husband's) creditors have a right to stand in the place of the mortgagee to come round on the wife's estate."

## CHAPTER VI.

### LIABILITIES ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY THE DEATH OF THE HUSBAND.

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#### SECTION I.

#### WHETHER THE WIDOW IS BOUND TO BURY HER DECEASED HUSBAND.

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WHETHER THE  
WIDOW IS  
BOUND TO BURY  
HER DECEASED  
HUSBAND.

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As a general rule it would rather appear that the widow is not subject to this obligation, which seems with more reason and justice to fall on the husband's representative (*a*).

In a late case (*b*), however, it was held by the Court of Exchequer that a widow, who was also an infant, might bind herself by contract for the expense of her husband's interment. This conclusion (arrived at by an exercise of judicial ingenuity, which may be thought not entirely to have overcome the difficulties of the subject) proceeded on the ground that the decent burial of the deceased husband should be construed to be a benefit and comfort to his surviving and sorrowing widow; and therefore that the case should be regarded as coming within the rule of law which makes the contract good where the infant is a gainer by it. After holding that an infant husband could contract for the burial of his deceased wife, she being

(*a*) See *Tugwell v. Hayman*, 3 Camp. 298; *Rogers v. Price*, 3 Y. & J. 28.

(*b*) *Chapple v. Cooper*, 13 Mee. & Wel. 259; 13 Law J. N. S. Exch. 286.

WHETHER THE  
WIDOW IS  
BOUND TO BURY  
HER DECEASED  
HUSBAND.

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*persona conjuncta* with him, and her interment being a personal benefit to him, the Court said—"If this be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end; and so she may contract, and her infancy is no defence if the contract be for her personal benefit."

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## SECTION II.

REVIVAL OF  
WIFE'S LIABILITY.  
TIES.

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### REVIVAL OF THE WIFE'S LIABILITY TO PERSONAL EXECUTION.

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DURING marriage, the wife, as we have already seen, was protected by her coverture from personal execution in respect of debts contracted by her *dum sola* (c); unless, indeed, it appeared that she had separate property. When, however, her coverture is put an end to by the death of her husband, she is again subject to a demand and to personal execution for those debts which, having been contracted by her before marriage, have remained undischarged and unsatisfied during the coverture. Thus, in *Woodman v. Chapman* (d), where an action for debt was brought against a widow, it appeared that the debt had been contracted by her before her marriage with her late husband. The point was taken that his representatives alone were liable for it. But Lord Ellenborough held that the debt survived against the widow upon her husband's death.

This rule appears hard, especially in cases where the wife, by the very fact of matrimony, has surrendered all her property to her husband, whose representatives, it thus appears, cannot be charged for her debts.

(c) See *supra*, p. 40.

(d) 1 Camp. 189.

Causes of action survive against the wife, which accrued during the coverture in respect of her real estate; or for any personal wrongs done by her when sole (e).

REVIVAL OF  
WIFE'S LIABILITIES.

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If an action had been brought against the husband *alone* for a debt of the wife incurred by her *dum sola*, and he died before judgment, the action would abate; and it would be necessary for the plaintiff to begin again. But if the action had been brought against husband and wife together, the same consequence would not arise upon her husband's death before judgment. For in such a case I understand that by the practice of the common-law courts the plaintiff, by entering upon the roll a suggestion of the husband's death, might prosecute the suit against the surviving wife to judgment (f). If this be so, it furnishes a reason for joining the wife as a defendant in all actions brought against the husband in respect of debts contracted by his wife *dum sola*.

(e) See note by Lord Campbell to the above case of *Woodman v. Chapman*.

(f) See remarks of Tindal, C. J., in *Gaters v. Madeley*, 12 Mee. & Wel. 855.

## CHAPTER VII.

### RIGHTS ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY THE DEATH OF THE WIFE.

#### SECTION I.

#### HUSBAND'S RIGHT OF ADMINISTRATION.

**HUSBAND'S  
RIGHT OF AD-  
MINISTRATION.**

ON the death of the wife, the law compels the Spiritual Judge (in whom this jurisdiction resides) to grant administration of her estate to her husband, and to him alone, unless he renounce or decline it.

It would appear at one time to have been doubted whether the Ordinary might not refuse administration to the husband, and elect to grant it to the wife's next of kin (*a*). But Mr. Justice Williams, in his valuable work on Executors and Administrators, lays down the law as follows (*b*) :—"This right (the husband's right of administration to the wife) belongs to the husband exclusively of all other persons (*c*) ; and the Ordinary has no power or election to grant it to any other (*d*). The foundation of this claim has been variously stated : by some it is said to

(*a*) Toller's Ex. & Adm., 3rd Ed., p. 83.

(*b*) Vol. i., page 315. But see what is said *supra*, p. 53, note (*z*), as to the case where the husband dies without having taking out administration to his wife, and the question

arises who will then be entitled to letters of administration de bonis non of her estate.

(*c*) *Humphrey v. Bullen*, 1 Atk. 459.

(*d*) *Sir George Sand's case*, 3 Salk. 22.

be derived from the statute 31 Edw. 3, on the ground of the husband's being 'the next and most lawful friend' of his wife (e); while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (f). But the right, however founded, is now unquestionable, and is expressly confirmed by the statute 29 Car. 2, c. 3, which enacts, that the Statute of Distribution (22 & 23 Car. 2, c. 10,) 'shall not extend to the estates of *femes covert*, that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act.'"

This right of administration to the wife is not an ecclesiastical, but a civil right of the husband, though it is a right to be administered in the Ecclesiastical Court (g).

It would appear that it is only where there are choses in action of the wife unrecovered at her death, that the husband can gain any object by taking out administration to her. For we have seen that all her other personal property passes to the husband by virtue of the marriage :—that is, *jure mariti*.

Property received by the husband in this his representative character, as administrator of his wife, is liable to her debts; whereas property acquired by him *jure mariti* is his absolutely. This distinction, although artificial, is intelligible; and seems to follow as a necessary consequence from general rules. As the wife's administrator,

(e) 3 Salk. 22; *Elliott v. Gurr*, 2 Phillim. 19.

(f) Com. Dig. Administrator, (B. 6); *Watt v. Watt*, 3 Ves. 247. Others have supposed that the husband is entitled, as next of kin to the wife;

*Fortre v. Fortre*, 1 Show. 351; *Rex v. Bettenworth*, 2 Stra. 1111, 1112; but it seems clear that the husband is not of kin to his wife at all; *Watt v. Watt*, 3 Ves. 244.

(g) Williams on Exors., ubi supra.

HUSBAND'S  
RIGHT OF AD-  
MINISTRATION.

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therefore, the husband is answerable to the amount of her assets. And a creditor in respect of a debt due from her before marriage (for during the coverture she cannot have contracted any obligation) may in such a case and to this extent recover from the husband. Thus, in *Heard v. Stanford* (h), the defendant's wife had dum sola given the plaintiff a promissory note for 50*l*. She afterwards married, bringing her husband a fortune of 700*l*.; part of which he received during the coverture, and part consisted of a chose in action recovered by him after her death, as her administrator. Lord Chancellor Talbot, upon a bill filed against the husband by the promisee of the note, decreed an account of what he had received since his wife's death, as her administrator, but declared that he should be liable for so much only.

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SECTION II.

HUSBAND'S RIGHT TO ARREARS OF RENT OF WIFE'S ESTATE.

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HUSBAND'S  
RIGHT TO  
ARREARS OF  
RENT.

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BEFORE the 32 Hen. 8, c. 37, if a husband did not, during the coverture, recover arrears of rent which had become due to his wife before the marriage, he could not after her death compel payment of them. This was an inconvenience; and was remedied by this Act, which gives the husband and his executors and administrators an action of debt for such arrears, with liberty to distrain for the same in like manner and form as if his wife were still living (i).

(h) Ca. Temp. Talb. 173; 3 P. 4th Ed., tit. "Bar. and Fem.," p. 84; Wms. 409. 1 Rep. 206.

(i) Co. Litt. 351, b.; Com. Dig.,



## SECTION III.

## CURTESY CONSUMMATE.

CURTESY CON-  
SUMMATE.

THE husband's curtesy, which, as before observed (*k*), initiates on the birth of issue capable of inheriting the wife's estate, becomes consummate on the dissolution of the marriage by her decease. The husband, while in the enjoyment of this estate, is called tenant by the curtesy, and sometimes tenant by the curtesy of *England*; though why of *England*, in particular, is not apparent; since the same right exists in *Scotland*, and was, I apprehend, common to every country under the feudal government.

The wife's estate, to be subject to the curtesy, may be either legal or equitable. But it must be a several one, or else held under a tenancy in common. It must not be joint (*l*). It must also be an estate in possession (*m*).

"It would seem," says Mr. Williams (*n*), "that under the law of inheritance, as it now stands, the husband can never become tenant by the curtesy to any estate which his wife has inherited. For descent is now traced, not from the person last actually seised, but from the last purchaser (*o*). The issue of the wife, therefore, must trace their descent, as heirs to the estate, not from the wife, but from the purchaser; and there is consequently no possibility of their ever inheriting the estate as her heirs. The condition, therefore, which would entitle the husband to become tenant by the curtesy cannot be fulfilled."

(*k*) *Supra*, p. 123.

(*l*) *Co. Litt.* 183, a.

(*m*) 2 *Bla. Com.* 127.

(*n*) *Real Property*, p. 168.

(*o*) Under the 3 & 4 Will. 4, c. 106, establishing the new rules of descent.

CURTESY CON-  
SUMMATE.

For which, and for other reasons, it is probable that tenants by the curtesy will but rarely hereafter give trouble to the Courts; and much curious learning relative to them and their estates is now become useless.

One thing, however, may be adverted to; namely, that where the husband *alone* has, during the coverture, charged his wife's estate, the charge, which would otherwise expire with the coverture, will, on his becoming tenant by the curtesy, continue during his life (*p*).

(*p*) 1 Rep. 137.

## CHAPTER VIII.

### LIABILITIES ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY THE DEATH OF THE WIFE.

#### SECTION I.

#### THE HUSBAND'S OBLIGATION TO BURY HIS DECEASED WIFE.

HUSBAND'S  
OBLIGATION TO  
BURY HIS  
DECEASED  
WIFE.

THE husband is bound to bury his deceased wife; that is to say, he is bound to defray the charges of her interment. This is a legal obligation. Thus, in *Jenkins v. Tucker* (a), on the death of a wife during the absence of her husband abroad, a person who had paid the expenses of her funeral (the same having been suitable to the rank and fortune of the husband) was held entitled to recover from him the amount of the money so laid out. Nay, even an *infant* husband may contract for the interment of his deceased wife; for, in the case of *Chapple v. Cooper* (b), before cited, the Court of Exchequer stated the law to be as follows: "There are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule to say, that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If then this be so, the decent Christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal

(a) 1 H. Bla. 90.

(b) 13 Mee. & Wel. 259.

HUSBAND'S  
OBLIGATION TO  
BURY HIS  
DECEASED  
WIFE.

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advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage (c). If this be correct, then an infant husband may contract for the burial of his wife or lawful children. The contract will have validity, because it is a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, and, as such, it is a contract for his own personal benefit." Hence, it will bind him, though under age.

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DEBTS  
OF DECEASED  
WIFE.

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## SECTION II.

## DEBTS OF THE DECEASED WIFE.

WE have seen, and have thought it a reasonable arrangement, that the law which gives the husband the wife's property, subjects him also to the payment of her debts. For those debts, of whatever amount, he is liable throughout the coverture; although he may have received no fortune or pecuniary benefit by his wife. There is nothing very hard in this, as a general rule; although it is true that in some instances unwary and incautious husbands are surprised, and perhaps confounded, after matrimony, by the discovery of unforeseen and unexpected embarrassments.

We have now, however, arrived at the natural place for considering what becomes of the wife's debts at her death, the husband her surviving? Are they recoverable from her husband, who peradventure has received a million of money by his wife; or is he entitled to retain her dowry

(c) It is new to say, that because an infant can marry, therefore he may enter into other contracts. See *supra*, p. 12.

to his own exclusive use, bidding defiance to her creditors? In other words, does the law, (the perfection of reason,) and does equity, (the perfection of justice,) sanction an act which no honest man would commit?

This question was answered, upwards of a century ago, by a very great judge, whose splendid reputation in his own day was not eclipsed even by the glory of his more fortunate successor. In the case of *Heard v. Stanford*, Lord Chancellor Talbot (d) thus expressed himself:

"The question is, whether the husband, as such, be chargeable for a debt of his wife's, after her death, in a court of equity? As, on the one hand, the husband is by law liable to all his wife's debts during the coverture, although he did not get one shilling portion with her, and although her debts should amount to any sum whatever; so, on the other hand, it is as certain that if the debt be not recovered during the coverture, the husband is no longer chargeable as such, let the fortune he received be ever so great. The case perhaps may be hard, but the law hath made it so; and the alteration of it is the proper work of the legislature only" (e).

Therefore, if the debts of the wife are not enforced during the coverture, the husband cannot be charged with them afterwards, either at law or in equity; her death furnishing an absolution or escape to him from all her obligations.

(d) Lord Talbot was regarded by his cotemporaries as a "superior intelligence" (see his *Life* by Lord Campbell); but the reporters have not done him justice. His judicial career was short. He held the Great Seal for three years only. He died in office, in the flower of his age; and was succeeded by Lord Hardwicke.

(e) See *Lewis v. Nangle*, Amb. 150. 3 P. Wms. 409, 410. 1 Sch. & Lef. 263. *Woodman v. Chapman*, 1 Camp. 189. See also Rolle's Abr. 351, where the law is stated in the following barbarous Norman text: "Si un feme soit en dette al auter, et prit baron, et morust, le Baron ne sera chargé en dette pur ceo apres mort del feme."

## CHAPTER IX.

### RIGHTS ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY PARLIAMENTARY DIVORCE.

#### SECTION I.

#### LAW OF DIVORCE.

#### LAW OF DIVORCE.

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Parliamentary divorce a modern remedy, but arising from the ancient ecclesiastical doctrine of indissolubility.

It occasionally becomes necessary to consider the rights and liabilities of parties whose marriage has been dissolved by an act of the legislature; that is to say, by what is called parliamentary divorce; a contrivance which, though of comparatively modern date, is truly referable to causes which existed before the Reformation. We must therefore look back a little, in order distinctly to appreciate the principle upon which this remedy (one of great peculiarity) is grounded.

In the Catholic ages marriage was considered a sacrament. Consequently no human authority could rescind it, unless, perhaps, the Pope, as God's vice-gerent upon earth, had the power of dissolution—a power which he but rarely if ever exercised. The law of divorce, therefore, in this island, as in the rest of Europe, acknowledged throughout the cardinal doctrine of indissolubility.

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DIVORCE.

Universality of  
that doctrine.

To set aside a marriage in those times, proof must have been given that the contract itself was invalid. Conjugal infidelity furnished a ground for separation. But nothing short of death could release the nuptial bond. The course, therefore, was to assert some obstructing, antecedent impediment, as a previous betrothment, undue consanguinity or affinity, physical incompetence, or mental incapacity. Any one of these points established, the marriage was thereupon declared null ab initio. But if originally valid, it was, under all circumstances, positively and absolutely indissoluble. The hardship of such a state of things would have been great, or rather, would have been intolerable, were not the Catholic tribunals, we are well assured, in general very liberal and indulgent in their construction of legal impediments to matrimony. Every one knows how much it was the policy of the Roman church to multiply these impediments; the power of dispensation having been for many centuries a fruitful source of ecclesiastical revenue. To this end the spiritual lawyers—the canonists—invented many ingenious fictions, distinctions, and refinements, which made it in most instances no very difficult matter to annul a marriage. The most remarkable of all their contrivances in this kind was that by means of which the legitimate impediments of consanguinity and affinity were extended to an almost ludicrous extreme. For not only did they forbid marriage with a seventh cousin, but they held that the relation of affinity

Maxims of the  
canonists.

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might be contracted by mere commerce between the sexes. And having once established this position, they deduced from it many startling conclusions. Thus, if a man had carnally known one sister, it would have been incest in him to marry or to have sexual intercourse with the other sister, or even with any of her relations to the seventh degree; because, said the canonists, an affinity resulted from the commerce with the first sister, which affected all her relatives standing within the scope of the seven proscribed degrees. Fornication, therefore, according to these authorities, was as much the creator of affinity as matrimony itself. In proof of which assertion we may refer to the notable case of Margaret, widow of James IV. of Scotland (a), who, after the king's death, having intermarried with Lord Methven, attempted to get rid of that nobleman by a sentence of the Ecclesiastical Court, on the ground that before the marriage she had been (as the record expresses it) *carnaliter cognita* by her husband's fourth cousin, the Earl of Angus. And to the same effect is the case of Henry VIII. and Anne Boleyn. For when the father of the English Reformation invoked the aid of the spiritual court to divorce his second wife, he did so, not on the ground of her alleged adulteries, but on the ground of two distinct canonical impediments, namely, her pre-contract with Northumberland, and his own pre-intercourse with her sister Mary, whom we are told by Catholic writers the first Defender of the Faith had maintained for years as his concubine. Attempts have been made to vindicate Henry from this stain upon his memory. The story of his connection with Mary Boleyn is denied by all good Protestants. But whether true or false, it serves to throw light upon the point now under consideration; and

(a) Riddell's Scots' Peerage Law, p. 187.



shows that the institutions of the canon lawyers ministered well to the passions of any husband who might happen to combine the characteristics of a libertine and a tyrant. In fact, parties who sighed for their liberty did not often, in those days, sigh in vain; for wherever a marriage became hateful to one or other, or both, of the spouses, the canonists rarely failed to demonstrate that it was invalid; the only proof required by the Court being the mere confession of the parties (*b*). Yet these impediments, with the long train of sublimated subtleties which attended them, were not always oppressive to the laity. They were occasionally found to be a real accommodation and convenience. Thus, in cases of adultery, the injured party had no more stringent remedy than divorce *à mensâ et thoro*—a sort of insult rather than a satisfaction to any man of ordinary feelings and understanding. But if by the fertile exercise of canonical ingenuity some ante-nuptial disability could be suggested, complete redress would be given; for the contract would be pronounced invalid, and both parties would then have their freedom. The labours of the canonists, therefore, in this department, ought not to be the subject of indiscriminating censure, since, by means of them, the community was in a great degree relieved from the severe and unbearable consequences which would otherwise have sprung from an undeviating adherence to the iron doctrine of indissolubility.

Such was, and perhaps still continues to be, the Roman Catholic system of divorce *à vinculo matrimonii*; a system objectionable and mischievous in many ways, but chiefly so in this, that it almost invariably did something

LAW OF  
DIVORCE.Facility of divorce  
by the canon law.

(b) The statute 32 Hen. 8, c. 38, speaking of the canonistic devices, states in its recital, "that no marriage could be so surely knit and

bounden, but it should lie in either of the parties' power to prove a pre-contract, a kindred and alliance, or a carnal knowledge, to defeat the same."

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essentially different from that which it professed to do. For while the true object in most cases was to *rescind*, the avowed object in all was to *annul* the matrimonial contract; thus effecting covertly and indirectly a purpose which, when sought on proper grounds, required no disguise, being at once reasonable in itself, and unequivocally permitted, if not actually enjoined by Divine authority.

At the Reformation, doctrine of indissolubility abandoned.

At the Reformation, marriage ceased to be regarded as a sacrament, and the doctrine of indissolubility fell speedily to the ground. It had, in fact, no support either in the Old Testament or in the New. It likewise became apparent that the restrictions of consanguinity and affinity, when pushed to the absurd extreme which has just been pointed out, were unwarranted by anything to be found in the Sacred Writings. And it was agreed that there ought to be no prohibition of matrimony beyond the limits of God's law, as unfolded in the 18th chapter of Leviticus; while, on the other hand, all marriages *within* those sacred boundaries were adjudged incestuous and illegal, and utterly above the reach of ecclesiastical dispensation (c).

Revision of our ecclesiastical code.

In this state of public opinion, it became necessary to institute a general reviewal of our ecclesiastical code, with which view an act was passed in 1533 (d), authorising Henry VIII. to appoint commissioners with very extensive powers, who, in conjunction with the royal theologian himself, were to revise and rectify the entire body of the canon law, in so far as operative within the realm. The same act was apparently renewed about two years afterwards (e); and in 1543 a further statute (f) was passed for the purpose of giving the commissioners still larger powers of reform and amendment. Similar endeavours were

(c) 32 Hen. 8, c. 38.

(d) 25 Hen. 8, c. 19, s. 2.

(e) 27 Hen. 8, c. 15.

(f) 35 Hen. 8, c. 16.

likewise made in the following reign (*g*), Edward VI. being full of zeal and ardour in the cause, but his premature death occasioned its suspension: for although the consideration of the subject was resumed in 1 Eliz. when a bill was introduced to renew the appointment of commissioners, the measure was dropped on the second reading in the House of Commons, and, as we learn from Burnet, was not again revived (*h*). The commissioners, however, prepared an elaborate report, embodying therein a new code of ecclesiastical laws, and the work was subsequently published under the title of "*Reformatio Legum Ecclesiasticarum*," a document rendered venerable by the learning and piety of its framers, who drew it up not in the hasty spirit of experimental innovation, but after a calm and deliberate scrutiny of more than twenty years. An important chapter of the new work was devoted to the subject of divorce, as to which it contained a variety of minute regulations. Suffice it for the purposes of our present argument to say that the "*Reformatio Legum*" authorised divorce *à vinculo* in cases of adultery, malicious desertion, and mortal enmities; and it abrogated entirely the inferior remedy of divorce *à mensâ et thoro*. This code, it is true, had not the legislative sanction, to make it the law of the land. But although not of actual binding obligation, it must have had great weight as expressing the opinion of the Reformed Church upon a question then regarded as purely ecclesiastical. Thus Sir John Stoddart, an eminent master of the canon law, informs us "that from about the year 1550 to the year 1602, marriage was not held by the church, and therefore was not held by the law, to be indissoluble (*i*).

(*g*) 3 & 4 Edw. 6, c. 11.

(*h*) History of the Reformation,  
vol. ii. p. 791.

(*i*) See Minutes of Evidence taken  
before the Lords' Committee on the  
Privy Council Bill, Session 1844.

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Marquis of  
Northampton's  
case.

In proof of this position we have in the year 1548 the famous case of Parr, Marquis of Northampton (*k*), where it was held by a commission of delegates, that the mere act of adultery of itself dissolved the nuptial tie; and that a sentence of divorce by the Ecclesiastical court following thereon (even although purporting to be only *à mensâ et thoro*) enabled the injured husband to marry again, living his guilty wife. It is unnecessary to state here the particulars of that celebrated and well-considered precedent. But the principle to be derived from it is this,—that where you have, by sentence of divorce issuing from a court of competent jurisdiction, a judicial ascertainment of adultery, not only is the nuptial tie rescinded, but the injured party is immediately at liberty to contract a second marriage. This I take to have been the opinion of the Church at all events; and that opinion was probably acted upon by the laity. It does not, however, appear that the Ecclesiastical Courts gave sentences of express dissolution. They seem rather to have adhered to their ancient form of judgment; they only divorced *à mensâ et thoro*. But in whatever shape their decrees were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony. This being the case, we find that towards the close of the reign of Elizabeth, certain important ordinances were enacted by the Chamber of Convocation. These, though now more or less forgotten or lost sight of, were passed with great solemnity, and confirmed by the Queen. They were subsequently known as the Ecclesiastical Constitutions of 1597. One of these ordinances, the 105th canon, was in the following terms:—

Ordinances of  
Convocation in  
1597.

Forasmuch as matrimonial causes have been always reputed among the weightiest, and therefore require the greatest caution when they

(*k*) Burnett's Reformation, vol. ii. p. 115.

come to be handled and debated in judgment, especially in causes wherein matrimony is required to be *dissolved* or *annulled*; we strictly charge and enjoin that in all proceedings in *divorce*, and *nullities of marriage*, good circumspection and advice be used, and that the truth may, as far as possible, be sifted out by the depositions of witnesses and other lawful proofs; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath either within or without the Court.

Here, then, the process of *dissolving*, and the process of *annulling* matrimony, are plainly discriminated as separate remedies then existing in the Spiritual Courts. The words seem to admit of no other construction. They refer to the *dissolving* divorce, and to the *nullifying* divorce, as proceedings in themselves altogether distinct, substantive, and independent. Another canon, the 107th, passed on the same occasion, having nothing to do with dissolving or nullifying divorces, lays down the following regulation as to divorce *à mensâ et thoro* :—

In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the said sentence, that the parties so separated shall live chastely, and neither shall they, during each other's life, contract matrimony with other person. And for the better observance of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security unto the Court, that they will not any way break or transgress the said restraint or prohibition.

In the year 1597, therefore, it still continued to be the opinion of the Church of England, that upon a divorce for adultery, even though only *à mensâ et thoro*, the parties might marry again. The very fact of enjoining a prohibitory bond, implies that the marriage, which the bond was intended to prevent, would have been valid. The learned and judicious Dr. Hammond lays it down with great clearness,

Prohibitory bond.

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DIVORCE.

that "requiring a bond does infer that this marriage, after a Christian divorce, is not looked on by the Church as an adulterous commission, but rather as a matter of dangerous consequence." And this certainly was the prevailing sentiment of our ablest divines of the seventeenth century. Besides, the authors of the canon would not have designated such a connection by the name of matrimony, unless they had held it really entitled to that appellation.

The 107th canon, however, seems to have gone an unwarrantable length in prohibiting such engagements. Bishop Cozens contends that this part of the canon is illegal; and Dr. Hammond is of the same opinion, though he does not express himself so decidedly. Restraints upon matrimony are not favourites of the law; and it may be doubted whether any of our civil courts would put in suit the bond or recognizance which is to this day exacted from the suitors as a condition precedent of sentence in the Ecclesiastical Courts; a species of judicial duress, for which it will not be easy to find a parallel in the practice of temporal tribunals.

At the same time it must be observed, that had the Ecclesiastical Courts continued to entertain suits for the *dissolution* of marriages (as they clearly ought to have done in cases of adultery), but little inconvenience would have resulted from the restraint imposed by the 107th canon; for that canon applied solely to divorces *à mensâ et thoro*.

But while the Church of England, as a body, thus disclaimed the doctrine of indissolubility, it is probable that sundry individual ecclesiastics adhered to the old opinion. Thus Whitgift, who was Primate from 1583 to 1603, having called before him certain *sage divines and civilians*, put to them this question,—“Whether, after divorce, it were

lawful for a man to marry again, his first wife being still alive?" To which they responded in the *negative*; whereupon, the archbishop being a member of the Court of Star chamber, it was contrived soon afterwards, in 1602, to bring before that tribunal the case of Rye v. Foljambe. There it appears that Foljambe, having been divorced for adultery, married a second time, living his first wife; and it was held that the second marriage was void, "because," according to the report of Moore (l), "the first divorce was but *à mensâ et thoro*, and not *à vinculo matrimonii*; and John Whitgift, then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this." Now of this determination some may think it enough to say that it was a "Star Chamber matter." It was a direct contradiction of the "Reformatio Legum," of the Marquis of Northampton's case, and of the Ecclesiastical Constitutions of 1597. It was also opposed to the practice of the laity for at least half a century. Accordingly, Mr. Serjeant Salkeld, in his note upon the case (m), says that "in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again. But in *Foljambe's case*, anno 44 Eliz. in the Star Chamber, *that opinion was changed*." So that the decision appears to have had all the characteristics of an arbitrary exercise of power by a tribunal which, in fact, had no legal jurisdiction over the subject matter; a tribunal too, which, for its tyrannical excesses, was, in a few years afterwards, swept away by an indignant parliament.

Rye v. Foljambe.

The decision in Foljambe's case was not assented to by the Church of England; for the Chamber of Convocation,

Ordinances of  
convocation in  
1603.

(l) P. 683.

(m) 3 Salk. 138.

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its popular parliament, in the succeeding year, re-enacted, word for word, the Ecclesiastical Constitutions of 1597; and these, as subsequently confirmed by James I., have never since been repealed or disturbed, but are now a substantive part of the ecclesiastical law of this kingdom; being, in fact, the well-known canons of 1603. In the following year, 1604, the Statute of Bigamy (1 Jac. 1, c. 11) was passed by the legislature, making the offence felony; but containing an express proviso that the act should "not extend to any person divorced by sentence of the Ecclesiastical Court." For the legislature, we may well believe, did not intend to make that a felony which had so often received the sanction of competent authorities; which had been approved as legal by the delegates in 1548, and which had been twice confirmed as valid by the Chamber of Convocation; once in 1597, and again in 1603.

How far the conduct of the laity may have been affected by these proceedings it is difficult now to conjecture. What particular rule respecting second marriages was followed in the reign of James I., or in that of his son, or during the time of the Commonwealth, we know not. Mr. Spence, indeed, in his work on Equitable Jurisdiction (n), suggests it as "not unlikely" that the Court of Chancery decreed divorces *à vinculo matrimonii*; and upon that surmise builds another, namely, that the American courts of equity carried over with them from England their now existing practice of dissolving marriage contracts. With great respect for Mr. Spence, I must observe that both these speculations seem groundless. As to what was anciently done by the clerical chancellors, there is no evidence that any of them, as chancellors, ever meddled with the marriage contract. If the proposition had been

Whether divorces  
were ever decreed  
in Chancery.

(n) Vol. i. p. 702.



advanced respecting the Privy Council, or Court of Star Chamber, there would have been more colour for it. But as to the Court of Chancery, there is nothing to support the fabric of Mr. Spence, except two obscure entries in Tothill's Reports (*o*), referable to the time of Lord Ellesmere, and occurring near the close of Queen Elizabeth's reign. The cases there mentioned, however, are cases of divorce *à mensâ et thoro*, and not *à vinculo matrimonii*. This has been ascertained on an examination of the proceedings which are still extant in the Rolls Office (*p*). In the Life of Sir Leoline Jenkins (*q*) notice is taken of "Pierrepoint's petition to the Lord Keeper for a commission to dissolve a marriage." But this seems to have been a mere experiment made shortly after the Restoration, and before the government was settled. It came to no result further than that the Lord Keeper ordered a reference (I believe to Sir Leoline Jenkins himself), and, upon a report, the matter dropped.

As we are on this subject it may be as well to observe in passing, that sentences of divorce could in no case be had after the death of the parties; neither after the death of the husband, though the wife should be alive, nor after the death of the wife, though the husband should be alive (*r*). And this, I believe, is still the rule in the Ecclesiastical Courts.

Divorce could not be had after death of parties.

But to resume our recital; we are, in the reign of Charles II., enabled to lay our finger upon a case which shows that so far down as the year 1669 the only obstacle which was considered an insuperable impediment to a

(*o*) Ed. 1649, p. 61; ed. 1671, p. 124.

(*p*) I am indebted for this information to the kindness of Mr. Busk, of the Chancery bar, whose profes-

sional avocations led to his making the inquiry.

(*q*) Vol. ii. p. 723.

(*r*) Com. Dig. tit., "Bar. & Fem." (c. 6).

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second marriage after sentence of divorce *à mensd et thoro* for adultery, was the bond in the Ecclesiastical Court; which, however, could have been binding upon *one* only of the parties. I am now referring to the case of Lord Roos, which has been usually considered as furnishing the first example of a parliamentary divorce; whereas it was a bill brought in merely to be relieved from the restraint and prohibition of the Ecclesiastical Court. The facts were shortly these: In the year 1666, an act was passed bastardising the children of Lady Anne Roos, by reason of her adultery; whereupon her husband, Lord Roos, followed up this proceeding by obtaining from the Spiritual Court a sentence of divorce *à mensd et thoro*, upon the usual condition of not marrying again in his wife's lifetime, for which he gave security as required by the canon. In this situation, being the next heir to the Rutland peerage, he was advised, that, although his marriage was rescinded, he had still to get rid of his bond or recognizance. No other way seemed so proper or sufficient for this purpose as an Act of Parliament. Accordingly a bill was brought in, entitled "An Act for Lord Roos to marry again." This, therefore, was not a divorce bill. It did no more than simply enable Lord Roos to contract a second marriage, the canon and the bond notwithstanding (s).

The case is principally interesting and important as constituting a distinct legislative negation of the doctrine of indissolubility. The difference between it and the case of the Marquis of Northampton was this: The Marquis was barred by no restraint from marrying another wife immediately after the sentence; whereas Lord Roos was

(s) A copy of the bill in Lord Roos's case procured from the Parliament Office, is given at length in

an article of mine on "Divorce" in the Law Review of February 1845.

prevented from doing so by the canon and the bond, from the binding cogency of which it was the sole object of the bill to relieve him.

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The first genuine example of a dissolution of the nuptial tie by parliament was in the case of the notorious mother of Savage—the Countess of Macclesfield. There the aid of the legislature was sought, because, in consequence of the skilful opposition set up by the Countess in the Spiritual Courts, and the narrow antiquated maxims which there prevailed, she contrived to baffle all her husband's efforts to obtain a sentence of divorce *à mensâ et thoro*. The circumstances of the case, however, were so scandalous and flagrant, that it would have been an outrage upon every principle of justice to withhold relief. Accordingly, the bill of Lord Macclesfield made its way through parliament in 1697, unembarrassed by any other opposition than some feeble expressions of dissent on the part of the Roman Catholic members.

First case of  
parliamentary  
divorce.

The next instance of a legislative dissolution of marriage was in the Duke of Norfolk's case. There also a sentence of divorce was refused by the Ecclesiastical Court, although the Duke tried the experiment more than once. He however recovered damages at law from the adulterer, Sir John Jermayne. And after this bill had been repeatedly rejected by the Lords, it became at last successful in 1700. And this brings us to the case of Box, in 1701, which I must now rescue from its obscurity, by pronouncing it the earliest specimen of a dissolving statute passed by the legislature, after sentence of divorce in the Ecclesiastical Court. To this era, therefore, is to be referred the commencement of the system of parliamentary divorce; which, though not so old as generally fancied, has still a respectable antiquity.

Second case.

Case of Box.

The petition of Mr. Box, as entered in the Lords'

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DIVORCE.

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Journal of Feb. 19, 1700, prays that he may have "leave to bring in a bill to dissolve his marriage with Elizabeth Eyre, she having lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definitive sentence in the Arches Court of Canterbury." The bill was intituled, "An act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again;" a title followed from that time to this. The bill passed in 1701.

Re-establishment  
of the doctrine of  
indissolubility.

The change of system thus introduced, is not to be regarded as indicating any real change of sentiment in the mind of the nation on the subject of divorce. The course taken in Mr. Box's case was probably resorted to *ob majorem cautelam*. But it produced a consequence foreign to the purpose of its authors; for in process of time it gave rise to an opinion that nothing short of an Act of Parliament could dissolve an English marriage—an opinion which, though owing its birth to a mere accident, is now as firmly settled as if it had been determined upon solemn deliberation by the highest court of justice in the realm.

Upon the whole matter I venture to deduce this conclusion; that since the Reformation the Ecclesiastical Courts have neither truly represented the sentiments, nor faithfully obeyed the dictates, of the Church on the subject of divorce. For while the Church evidently meant to repress conjugal delinquency by an appropriate application of two distinct remedies, divorce *à vinculo* and divorce *à mensâ et thoro*, the Ecclesiastical Courts have thwarted that intention, first, by refusing to award divorce *à vinculo* in any case whatever; and, secondly, by granting even divorce *à mensâ et thoro* in those cases only where it could be allowed consistently with the occult maxims of the canon law, how repugnant soever to the law of the land. And the consequence is, that the doctrine of indissolubility operates in

And consequences  
thereof.

this country now, with a rigour unknown in Catholic times; the various devices and refinements, which then afforded so many loopholes of escape from its severity, having been each and all put an end to at the Reformation. So that matrimonial iniquity, however flagrant and persevering, is at present subject to no other *legal* redress than a spiritual sentence of separation, which leaves the parties bound as before, except that they need not cohabit. But while the *law* is thus stinted in its remedy, the *practice of Parliament* (t) is more liberal; for it supercedes the law in particular instances, by passing special enactments in favour of those who make out a case strong enough for its interference, and who are rich enough to pay the price by which alone that interference can be purchased. The poor, nay even the moderately opulent, are excluded from the benefit of this truly aristocratic indulgence. In other words, justice is denied to the bulk of the Queen's subjects; whose long submission to this state of things is a conspicuous proof of the patient qualities which distinguish the English nation.

Undue facilities in obtaining divorces are to be deprecated. But an unreasonable stiffness on the other side is contrary to justice, unwarranted by Scripture, and of the worst possible consequences to public morality (u).

(t) For the practice of Parliament on Bills of Divorce, see Macqueen's House of Lords.

(u) Our Right Reverend Prelates assent in Parliament to the passing of Divorce Bills. We have therefore the highest ecclesiastical authority for holding that marriage under certain circumstances may and ought to be dissolved. Then are those circumstances confined to the higher

or wealthier orders of society! This cannot be maintained. Either, then, it is wrong to pass any Divorce Bill, or it is wrong to restrict the remedy to a particular and favoured class. But that question is settled; for wherever the necessary fees are paid, Bills of Divorce become law with as much certainty as other suits, duly prosecuted, ripen into judgments.

## SECTION II.

HUSBAND'S  
RIGHTS WHEN  
COMPLAINANT.HUSBAND'S RIGHTS WHERE HE HAS BEEN THE SUITOR  
FOR DIVORCE.

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|--|---|
| <ol style="list-style-type: none"> <li>1. <i>Property clauses in divorce bills</i> . . . . . 210</li> <li>2. <i>Enactment that if husband marry again, he and his after-taken wife shall have the same rights respectively as if the divorced wife were dead</i> . . . . . 210</li> <li>3. <i>Enactment depriving the di-</i></li> </ol> | <ol style="list-style-type: none"> <li><i>vorced wife of the rights, which, but for the act, would accrue to her as widow out of her husband's property</i> . 211</li> <li>4. <i>Enactment excluding the husband from all claim upon the divorced wife's after-acquired property</i> . . 212</li> </ol> |
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Property clauses  
in divorce bills.

In all Divorce Acts it is now the settled usage of Parliament to introduce certain clauses, which may be called property clauses, in order to regulate the rights and liabilities of the parties after the nuptial tie has been dissolved.

Let us therefore inquire, in the first place, what are the husband's rights under an act passed to free him from his connection with a wife whose misconduct has been established to the satisfaction of Parliament.

Divorced wife  
considered as  
dead.

After enabling the husband to marry again, a clause will be inserted for the purpose of providing that, should he so marry again, he will be entitled to all the rights of a husband as regards the property of his after-taken wife; and that she, on the other hand, will, as regards *his* property, be entitled to all the rights of a wife, precisely as if her predecessor, instead of being divorced, had departed this life. The object of this enactment is plain. The clause itself is usually expressed as follows:—

And be it enacted, that the said A. B. (the husband) shall be entitled to be tenant by curtesy of the manors, messuages, lands, tenements, and hereditaments of any such wife or wives as he may hereafter marry ;

and that such wife as he may so hereafter marry shall, if she survive him (unless barred by jointure or otherwise), be entitled to dower, freebench, and thirds of his estate, as fully as if the said C. D. (the divorced wife) had died before the marriage of the said A. B. (the husband) with such future wife.

HUSBAND'S  
RIGHTS WHEN  
COMPLAINANT.

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This clause is not happily framed, but it has received the stamp of a long-continued legislative sanction. It would be safer and equally effective if expressed in general terms. Some attention to grammar too might, perhaps, be recommended. And there would be no harm in ascertaining what is meant by the word "thirds," as contra-distinguished from dower and freebench. If it refer to the widow's interest in her husband's *land*, it is a pleonasm. And if it refer to personal estate, it will be often inapplicable.

The apparent intention of the next clause is to deprive the divorced wife of the rights which, (but for the act), would accrue to her as a widow out of the husband's property, in the event of her survivorship. The clause has the usual fault of being too special. It is as follows:—

Divorced wife  
loses rights that  
would have  
accrued to her as  
widow.

And be it enacted, that the said C. D. (the divorced wife) shall be, and is hereby, barred and excluded of and from all dower, freebench, and thirds at the common law, by the custom or otherwise; and all other rights, titles, inheritances, claims, and demands by common law or by custom, which she might claim by, or through, or in consequence of her marriage with the said A. B., of, in, to, or out of all and every or any of the manors, messuages, lands, tenements, or hereditaments, or other estates whereof or wherein the said A. B., previously to, and at the time of, his said marriage with the said C. D., was, now is, or since his said marriage hath been, or at any time hereafter shall or may be seised for any estate of inheritance, and all claims and demands into, or upon, or out of the personal estate and effects of which the said A. B. now is, or at any time hereafter shall be possessed of or entitled to.

The last property clause in a divorce act, where the

**HUSBAND'S  
RIGHTS WHEN  
COMPLAINANT.**

Husband has no  
claim on divorced  
wife's after-ac-  
quired property.

husband is complainant, deprives him of all claim on any property which may come to his divorced wife *after* the dissolution of the marriage. This reasonable object is sought to be attained by the following clause:—

And be it enacted, that the said A. B. (the husband), and all persons claiming, or to claim, by, from, or under him, is and are, and shall for ever be, barred and excluded of and from all rights, claims, titles, and interests of, in, to, or out of, any real or personal estate which the said C. D. (the wife) shall or may at any time or times hereafter acquire, or become seised or possessed of, or entitled to, by descent, gift, devise, purchase, or otherwise howsoever, and that the said C. D. (the wife), her heirs, executors, and administrators, shall hold and enjoy the same for all her or their estate and interest therein, for her and their own use, benefit, and advantage, exclusive of the said A. B. (the husband), his heirs, executors, and administrators, and all and every other person and persons whomsoever, claiming, or to claim by, from, or under him.

Now it is observable that while, by these clauses, the divorced wife is excluded from all claim upon her injured husband's property, whether enjoyed by him before the divorce, or coming to him after it; his claim upon *her* property is not excluded in the same general terms. The exclusion of the injured husband's claim upon the divorced wife's property, is limited to property acquired by her after the passing of the Act.

This being so, has the injured husband a right to receive the rents and profits of the divorced wife's real estate during their joint lives; and is he entitled to be tenant by the curtesy, after her death, supposing that he would have been so entitled had there been no divorce? Of her chattels real, has the injured husband the same right of enjoyment and disposition as if the Act had not been passed? Or do they, when undisposed of at the date of the Act, go to the divorced wife as they would do by ordinary survivorship? Again, what becomes of her



choses in action which, during the coverture, the injured husband had a right to reduce into possession? Does this right continue in him, or do her choses in action belong to the divorced wife in the same way as they would do in the common case of survivorship? And where her estates were, during the coverture, mortgaged for her husband's debts, is he, or is he not, on the passing of the Act, entitled to resist her demand of redemption and exoneration?

HUSBAND'S  
RIGHTS WHEN  
COMPLAINANT.

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These questions, whether solid or merely plausible, it would be well, and not difficult, to obviate hereafter by express and appropriate enactments. They are not merely fanciful difficulties; for some of them form the subject of an existing litigation.

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### SECTION III.

#### WIFE'S RIGHTS WHERE THE HUSBAND HAS BEEN THE SUITOR FOR DIVORCE.

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WIFE'S RIGHTS  
WHEN HUSBAND  
IS THE COM-  
PLAINANT.

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THE subject of this section has been, in a great measure, anticipated by what is said in the last.

It may, however, be remarked, that it is not the practice of Parliament to cast the divorced wife upon the world in a state of destitution; for there is in the House of Commons a functionary called the "Lady's Friend" (an office generally filled by some member distinguished for his attention to the private business of the House), whose duty it is to see that the husband petitioning for divorce makes some suitable but moderate provision for the divorced wife; which, however, she will forfeit on proof of her continuance in, or renewal of, misconduct.

Wife not left  
destitute,

The wife is not, in express words, enabled to marry again during her husband's lifetime, the permissive clause

WIFE'S RIGHTS  
WHEN HUSBAND  
IS THE COM-  
PLAINANT.

Wife as well as  
husband may  
marry again.

in the Act being limited to the husband; for whose relief and accommodation the legislature interposes. But she is not interdicted; and as the marriage is annihilated by the Act, it is a logical consequence that she should have the same liberty to marry again as her husband. Some have doubted this; but the courts are not likely to countenance a doubt which, if encouraged, might prove portentous to the peace of many families.

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SECTION IV.

WIFE'S RIGHTS  
WHEN COM-  
PLAINANT.

WIFE'S RIGHTS WHERE SHE HAS BEEN THE SUITOR  
FOR DIVORCE.

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THERE are only three instances in which the wife has succeeded in obtaining a parliamentary divorce against her husband (*x*); the inclination of the legislature being to discourage such applications on the part of the wife, except in cases of great and extraordinary enormity.

When, however, a bill does pass at the suit of the wife against her husband, she will be permitted, by an express clause, to marry again immediately on the passing of the Act.

The property clauses in divorce bills by the wife against the husband are substantially the same as those which are found in divorce bills by the husband against the wife.

They enact that if the injured wife marry again, she and her after-taken husband shall have the same rights respectively as if the divorced husband were dead.

They also enact that the divorced husband shall be excluded from all claim upon her estates, and upon her goods, chattels, and personal ornaments "enjoyed by her

(*x*) Macqueen's House of Lords. Introductory chap. upon Divorce, p. 474.

in possession in her own right," or which she may afterwards acquire, &c.

WIFE'S RIGHTS  
WHEN COM-  
PLAINANT.

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In short, she seems to be restored, so far as *her own* property is concerned, to the position in which she stood before her marriage.

But there is no express provision made to determine what her rights shall be as regards the property of the divorced husband. For anything appearing in the Act to the contrary, she may still, notwithstanding the divorce, claim dower out of her divorced husband's estate at his death, and her distributive share of his personal property.

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#### SECTION V.

HUSBAND'S RIGHTS WHERE THE WIFE HAS BEEN THE  
SUITOR FOR DIVORCE.

HUSBAND'S  
RIGHTS WHEN  
WIFE IS COM-  
PLAINANT.

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THE divorced husband is not expressly permitted to marry again during the life of his injured wife. But where there is no positive interdiction, a liberty not given in words may be construed by implication.

In the event, however, of his so marrying again, his injured wife being still alive, it may not be very easy to define the rights that may thereupon accrue. When the case arises, justice will no doubt be done.

## CHAPTER X.

### LIABILITIES ARISING FROM THE DISSOLUTION OF THE MARRIAGE BY PARLIAMENTARY DIVORCE.

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#### SECTION I.

HUSBAND'S  
LIABILITIES  
WHEN COM-  
PLAINANT.

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#### HUSBAND'S LIABILITIES WHERE HE HAS BEEN THE SUITOR FOR DIVORCE.

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Does the husband's liability for his wife's debts, contracted by her when sole, cease on the passing of the divorce bill, as is the case when the marriage is dissolved by her death? There are no words in the Act to help our determination. And the lights of reason and justice produce different effects on different minds. Much will depend on the prior solution of other difficulties already suggested (a). This matter it were well to regulate by an express clause in divorce bills hereafter.

Under the present practice of Parliament I am not aware of any other liability to which the injured husband becomes subject on the passing of a divorce bill, except the obligation of satisfying the provision which is made in favour of the divorced wife at the instigation of the "Lady's Friend" in the House of Commons.

(a) See Chap. IX. sect. II. *supra*, p. 212.

## SECTION II.

WIFE'S LIABILITIES WHERE THE HUSBAND HAS BEEN  
THE SUITOR FOR DIVORCE.WIFE'S LIABILITIES WHEN  
HUSBAND IS  
COMPLAINANT.

WE have seen that by the common law on the dissolution of the marriage by the husband's death, the liability of the wife to personal execution in respect of debts contracted by her when sole, revives (b); such debts forming no charge against the deceased husband's representative. Then is the same consequence to ensue on the passing of the divorce bill? This question, like the others, should be obviated by an express clause.

## SECTION III.

WIFE'S LIABILITIES WHERE SHE HAS BEEN THE  
SUITOR FOR DIVORCE.WIFE'S LIABILITIES WHEN  
COMPLAINANT.

THERE will be less difficulty in holding that the wife's individual responsibilities revive against her in this case, because the husband is stripped of his marital rights by the Act; and whatever property she has ought of course to be subject to the demand of her creditors.

A case of hardship, however, might arise. The Divorce Act only bars the husband's claim upon his wife's property. It does not deprive him of that which, by the act of matrimony, had become his own property. Therefore, if he had gotten a fortune in cash by his wife, the legislature would not compel him to pay it back, or any part of it, to his

(b) See *supra*, p. 184.

WIFE'S LIABILITIES WHEN COMPLAINANT.

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wife. Perhaps, therefore, in such a case, if there were debts incurred by the wife *dum sola*, it would be thought fit not to relieve the divorced husband from their pressure. This, I apprehend, would be a fit case for a special clause in the bill.

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SECTION IV.

HUSBAND'S LIABILITIES WHEN WIFE IS COMPLAINANT.

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HUSBAND'S LIABILITIES WHERE THE WIFE HAS BEEN THE SUITOR FOR DIVORCE.

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It cannot be supposed that the legislature intends to favour a husband whose misconduct has occasioned the passing of a divorce bill. Then is he to be relieved from the obligations to which he became subject by the marriage? This cannot be affirmed in the absence of any express clause to that effect. But it must be observed, on the other hand, that by the Act he is deprived of all the wife's property. And the justice of continuing the liabilities to which he was exposed during the coverture, or of absolving him from them, may perhaps more conveniently be determined by a consideration of the particular circumstances of each case, rather than by the operation of general rules; which, if they exist at all, have certainly not yet made their appearance in the books of the law.

## APPENDIX No. I.

### DIRECTIONS AND FORMS OF PROCEEDING UPON ALIENATIONS BY MARRIED WO- MEN WITH THEIR HUSBAND'S CONCUR- RENCE (a).

#### SECTION I.

#### WHERE THE ACKNOWLEDGMENT IS MADE IN ENGLAND.

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

<p>1. <i>Object of the new regulations</i> . . . . . 2</p> <p>2. <i>Case of an acknowledgment of a deed by a married woman before a Judge or Master</i> . . . . . 2</p> <p>3. <i>Memorandum by a Judge or Master</i> . . . . . 3</p> <p>4. <i>Certificate by a Judge or Master</i> . . . . . 4</p> <p>5. <i>Affidavit by the attorney or solicitor employed, verifying the certificate of a Judge or Master</i> . . . . . 5</p> <p>6. <i>Affidavit by the attorney or solicitor and a third person, verifying the certificate of a Judge or Master</i> . . . . . 6</p> <p>7. <i>General remarks on the form and substance of the verifying affidavit</i> . . . . . 7</p> <p>8. <i>Affirmation by a Quaker</i> . . . . . 8</p> <p>9. <i>Filing of certificate and affidavit</i> . . . . . 8</p> <p>10. <i>Mode of proceeding in the office of acknowledgments</i> . . . . . 8</p> <p>11. <i>Case of an acknowledgment before perpetual commissioners</i> . . . . . 9</p>	<hr style="width: 100%;"/>	<p>12. <i>Memorandum by perpetual commissioners</i> . . . . . 10</p> <p>13. <i>Certificate by perpetual commissioners</i> . . . . . 10</p> <p>14. <i>Affidavit by the attorney or solicitor, verifying the certificate of perpetual commissioners</i> . . . . . 11</p> <p>15. <i>Affidavit by the attorney or solicitor and a third person, verifying the certificate of perpetual commissioners</i> . . . . . 12</p> <p>16. <i>The attorney or solicitor, if qualified, may be one of the commissioners</i> . . . . . 14</p> <p>17. <i>One of the commissioners, if an attorney, may make the affidavit</i> . . . . . 14</p> <p>18. <i>Whether the commissioner making the affidavit may also be the attorney or solicitor employed</i> . . . . . 14</p> <p>19. <i>Affidavit by one of the perpetual commissioners, verifying the certificate of himself and his co-commissioner</i> . . . . . 15</p> <p>20. <i>Affidavit by one of the perpetual commissioners, and a third person</i> . . . . . 16</p>
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(a) As to alienations by married women *without* their husband's concurrence, (under the 91st section of

the Fines and Recoveries Act), see *supra*, Chapter III., Section VI., p. 113.

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

Object of the new  
regulations.

ADVERTING to the remarks already made on alienations by married women with the concurrence of their husbands (*b*), we proceed in this place to give some practical explanations, and to set out certain forms, which are presented with the more confidence since they have received the stamp of official authority. The details are too complicated and voluminous to admit of their having been introduced in the body of the work.

The great study of the clauses of the late Act (*c*), which are applicable to this subject, as well as of the General Rules made by the Court of Common Pleas in pursuance thereof (*d*), has been to protect married women from an undue exercise of marital control in the executing of deeds affecting their estates. To this end, it is required, when the woman is in England, that the deed shall be acknowledged before a Judge or Master, or before two perpetual commissioners. These cases we will take in their order.

Case of an ac-  
knowledgment  
before a Judge or  
Master.

To begin, then, with the simplest case, that of an acknowledgment before a Judge or Master; it is to be observed that the attorney or solicitor employed (who must be one in actual practice) ought, by previous personal communication, to ascertain whether the married woman acts voluntarily, and really understands what she is about in executing the deed; and whether she expects to receive compensation or not. If she is to receive compensation, he should see that the terms thereof are evidenced by deed or writing; and if they are not, then he should have them reduced into writing to be produced before the Judge or Master. This preliminary inquiry has two objects: *first*, to prevent trouble and expence,

(*b*) *Supra*, pp. 28, 29, 30, 31, and 32. clauses applicable to this subject, *infra*, p. 34.

(*c*) 3 & 4 Will. 4, c. 74. See the (*d*) See these rules, *infra*, p. 40.



because if the attorney or solicitor find that she is not acting voluntarily, and with a proper understanding of the nature and effect of the transaction, he will not proceed further in the matter until her mind is set right in these respects; and *secondly*, because he will have to make subsequent affidavit of his having made such previous examination. The attorney or solicitor having thus pre-examined her, she is then brought before the Judge or Master, to whom likewise will be presented the deed; and by whom she will thereupon be duly examined apart, in the absence of the husband and of the attorney or solicitor concerned in the transaction (e): the latter, however, being afterwards admitted to hear the formal acknowledgment made, in order that he may be prepared to verify the certificate. After this formal acknowledgment has been made by the married woman, a memorandum of the fact will be endorsed upon (or written at the foot, or on the margin of) the deed; which memorandum will be signed by the Judge or Master (if satisfied), and the same will be expressed in the following terms, viz:—

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

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This deed, marked A., was this day produced before me and acknowledged by E., the wife of F. F., therein named, to be her act and deed; previous to which acknowledgment the said E. was examined by me, separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her. Dated this — day of — one thousand eight hundred and —.

Memorandum by  
a Judge or Master.

The Judge or Master will on the same occasion sign the following certificate, which must be on a separate piece of parchment; and which, to save trouble, ought to be

(e) The Rules of Court direct that the *inquiry* previous to the taking of the acknowledgment shall be made in the absence of the husband, and of the attorney or solicitor employed: see General Rules, No. 3, *infra*, p. 40.

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

Certificate by a  
Judge or Master.

prepared beforehand by the attorney or solicitor employed in the business.

These are to certify, that on the — day of —, in the year one thousand eight hundred and —, before me the undersigned Sir Thomas Wilde, Knight, Lord Chief Justice of the Court of Common Pleas at Westminster, [or, “before me Sir John Patteson, Knight, one of the Justices of the Court of Queen’s Bench at Westminster;” or, “before me the undersigned Sir George Rose, Knight, one of the Masters in Ordinary of the Court of Chancery;”] appeared personally E., the wife of F. F., and produced a certain Indenture, marked A., bearing date the — day of —, one thousand eight hundred and —, and made between the said F. F. (f) and E. his wife of the one part, and G. H. of the other part, and acknowledged the same to be her act and deed. And I do hereby certify, that the said E. was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me, apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

The Court will allow the certificate to be amended where the defects are not important. Indulgences of this sort, however, are not to be speculated upon. In *Ex parte Whitty (g)*, the certificate stated that the married woman had acknowledged the execution of indentures of lease and release; whereas she had been a party to the release only. The Court refused to order the amendment of the certificate.

The certificate must state that the married woman is of full age and competent understanding. This is a statutory requirement. But neither the Act nor the General Rules

(f) The husband must be a concurring party to the deed. If the certificate do not show that this is the case, the officer will refuse to file it.

In filling up the certificates of acknowledgment, the names *only* of the parties to the deeds, without their additions, are to be set out.—*Vide* form prescribed by the Act,

*infra*, p. 37.

All alterations, interlineations, or erasures in the certificate must have the initials of the Judge’s or Master’s clerk, before whom the acknowledgment is taken, set opposite thereto.

(g) 3 Man. & Gr. 201 ; 9 Dowl. 838 ; 3 Scott, N. S. 591.

say in what manner, or by what evidence, the Judge or Master is to be satisfied on the subject. However, it is perhaps as well to leave the matter to be governed by the exercise of discretion in each case (*h*).

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

In a case where it happened that the married woman was an infant trustee, who before her marriage had been ordered to execute a conveyance of the trust estate under the 11 Geo. 4, c. 60, s. 6, the Court authorised her acknowledgment to be taken; and there the certificate was of course silent as to her age and understanding. At all events, I apprehend it ought to have been so (*i*).

This much of the certificate. The attorney or solicitor employed professionally in the transaction will next make affidavit, verifying the certificate of the Judge or Master; which certificate should be annexed to the affidavit before the swearing, and so kept. The affidavit itself (which must be on parchment) will be in the following terms:—

#### IN THE COMMON PLEAS.

A. B., of — of —, Gentleman, one of the attornies [*or*, “solicitors”] of the Court of —, maketh oath and saith, that he knows E., the wife of F. F., in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said E. and the certificate signed by the Judge [*or*, “Master”] in the said certificate mentioned, on the day and year therein mentioned, at —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of full age and competent understanding, and that the said E. knew the said acknowledgment

Affidavit by the  
attorney or solicitor,  
verifying the  
certificate of a  
Judge or Master.

(*h*) It is frequently the practice of the Perpetual Commissioners, before taking the acknowledgment, to inquire of the solicitor employed for the married woman, whether he is prepared to make an affidavit of the fact of her being the individual she represents herself to be, and of her being of full age, and on the solicitor's answering the inquiry in the affirmative, to act on such information without other

evidence. There seems no reason why a Judge or Master should not follow the same course. But, in case of doubt, further proof might be proper.

(*i*) But in general the certificate will not be filed, unless the affidavit state positively that the woman is of full age. A statement of belief will not do. *Re Coventry*, 8 Scott, 147.

**WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.**

Where no provision is to be made this clause to be used.

Where any provision is to be made this clause is to be substituted for the preceding, which will of course in such case be omitted.

was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of her the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest; of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed [or, "writing"] [or, "that the terms thereof have been reduced into writing"], and that such deed [or, "writing"] has been produced to the said Judge [or, "Master"]]. And lastly, this deponent saith, that it appears by the deed acknowledged by the said E. that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c. (j)*

When it happens that the attorney or solicitor cannot satisfactorily depose to the married woman's identity and to her full age at the time of the acknowledgment, he will join with himself in the affidavit some other person who can speak to the facts, and who must be thought competent to do so by the individual taking the affidavit (*k*); which in such case will be in the following terms:—

**IN THE COMMON PLEAS.**

Affidavit by the attorney or solicitor and a third person, verifying the certificate of a Judge or Master.

A.B., of — in the county of — [*state trade, profession, or calling*], and C.D., of — in the county of —, Gentleman, one of the attornies [or, "solicitors"] of the Court of —, severally make

(*j*) All alterations, interlineations, or erasures in the affidavit must have the initials of the Judge's or Master's clerk set opposite thereto.

(*k*) That is to say, by a judge of one of the superior courts, or by a commissioner appointed for taking affidavits in the Court of Common Pleas.

oath and say. And first, this deponent A. B. for himself maketh oath and saith, that he knows E. the wife of F. F. in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein mentioned, the said E. was of full age. And the said C. D. for himself maketh oath and saith, that the acknowledgment in the said certificate mentioned was made by the said E., and the certificate signed by the Judge [*or*, "Master"] in the said certificate mentioned, on the day and year therein mentioned, at —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said C. D. for himself further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of her the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest; of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [*Or*, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent C. D. for himself further saith, that before her acknowledgment was so taken he was satisfied, and does now verily believe, that such provision has been made by deed [*or*, "writing"] [*or*, "that the terms thereof have been reduced into writing"], and that such deed [*or*, "writing"] has been produced to the said Judge [*or*, "Master"].] And lastly, the said C. D. for himself further saith, that it appears by the deed acknowledged by the said E. that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c.*

It is to be observed that a form of affidavit is annexed to the General Rules of 1834; which form is, by No. 6 thereof (*l*), required to be adhered to, subject to all necessary

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

Where no pro-  
vision is to be  
made this clause  
is to be used.

Where any pro-  
vision is to be  
made this clause  
is to be substi-  
tuted for the pre-  
ceding, which will  
of course in such  
case be omitted.

General remarks  
on the form and  
substance of the  
verifying affidavit.

(*l*) See *infra*, p. 42.

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and proper variations. It will be seen, when we come to deal with affidavits relative to acknowledgments taken abroad, that the Court has overlooked a considerable and an unnecessary deviation from the form prescribed. But it is not thence to be inferred that similar indulgence will be shown where the affidavit is made in this country.

The affidavit in all cases must speak positively to the fact of the married woman's being of full age; and must not be limited to an expression of belief on that point; otherwise, when the application comes afterwards to be made for filing, it will be rejected (*m*).

Affirmation by  
a Quaker.

In the case of a Quaker, his affirmation will suffice, instead of an affidavit (*n*).

Filing of certi-  
ficate and affida-  
vit.

The deed being now duly acknowledged, the Judge or Master having made thereon the necessary memorandum, and having signed the necessary certificate, and the same having been verified by the proper affidavit, nothing further remains to be done but to have the certificate and affidavit (as annexed to each other) duly filed of record, pursuant to the 85th section of the Act (*o*), which is done by delivering in the same at the proper office in Serjeant's Inn, Fleet Street, within a lunar month (*p*) from the date of the acknowledgment.

Mode of proceed-  
ing in the office  
of acknowledg-  
ments.

The registrar of acknowledgments issues an office copy of the certificate as directed by the 88th section of the Act (*q*); which office copy should ever afterwards accompany the deed, as evidence that the requirements of the

(*m*) *Re Coventry*, 8 Scott, 147.

(*n*) *Re Scholfield*, 3 Bing. N. C. 293.

(*o*) See *infra*, p. 38.

(*p*) When from any accident this period has been suffered to expire

before the filing, an application must be made to the Court or to a Judge. See General Rules of H. T. 1834, No. 7, and note thereon, *infra*, p. 42.

(*q*) See *infra*, p. 39.

Act have been complied with. The mode of proceeding in the office of acknowledgments is as follows :—

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The certificate and affidavit, upon being presented for registration, are examined by the clerk in the office, and, if *prima facie* correct, the fees are taken; and a small cheque or memorandum is given by the clerk, containing the date, the name of the county in which the premises are situate, the surname of the married woman, and the name of the attorney or solicitor filing; which memorandum or cheque must be returned when the office copy is subsequently called for, the same being considered to be due a month after the filing. The cheque or memorandum, when so returned, is retained in the office, and filed as evidence of the delivering out of the office copy. It is merely an acknowledgment for the fee. The registrars afterwards examine, with great strictness, the certificate and affidavit, which, if found by them to be correct, are filed of record; and the office copy of the certificate, as delivered out from the office, is declared by the Act to be evidence of the due filing (*r*).

I have entered into these particulars more fully here, in order to save repetition afterwards, because the proceedings and the effects will be the same where the acknowledgments are taken by perpetual and by special commissioners; subject, however, to certain necessary variations and peculiarities, which, if not all pointed out, may be collected from the Act and Rules, and a rational consideration of the objects which both are intended to accomplish.

When the acknowledgment is to be before perpetual commissioners, it is to be observed that both commissioners must have authority to act in the locality wherein

Case of an ac-  
knowledgegment  
before perpetual  
commissioners.

(*r*) See the 88th section, *infra*, p. 39.

WHERE THE  
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the acknowledgment is taken (s) ; and both must join in the examination.

After the acknowledgment has been made before the two perpetual commissioners, a memorandum of the fact will be endorsed upon (or written at the foot, or on the margin of) the deed ; which memorandum will be signed by them (if satisfied), and the same will be expressed in the following terms, viz:—

Memorandum by  
perpetual com-  
missioners.

This deed, marked B., was this day produced before us and acknowledged by E., the wife of F. F. therein named, to be her act and deed, previous to which acknowledgment the said E. was examined by us, separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her. Dated this — day of — one thousand eight hundred and —.

G. H.  
I. K.

The perpetual commissioners will then sign the following certificate, which must be on a separate piece of parchment ; and which, to save trouble, ought to be prepared beforehand by the attorney or solicitor employed in the business.

Certificate by  
perpetual com-  
missioners.

These are to certify, that on the — day of — in the year one thousand eight hundred and —, before us, G. H. and I. K., two of the perpetual commissioners appointed for the (t) — of — for taking the acknowledgments of deeds by married women, pursuant to an Act passed in the fourth year of the reign of His late Majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of

(s) *Ex parte Webster*, 4 Man. & Gr. 27 ; 1 Dowl. N. S. 678.

(t) The commissioners are required to describe themselves in the words of their appointment by the Chief Justice, for the jurisdiction in which they take the acknowledgment, and for that only. It is wrong

to go by reference to the alteration of boundaries made by the Municipal Reform Act, as is sometimes done. The Chief Justice in his appointment continues the old style. A list of the jurisdictions under the Fines and Recoveries Act is annexed hereto, *infra*, p. 46.



Assurance ;" appeared personally E., the wife of F. F., and produced a certain Indenture, marked B., bearing date the — day of — one thousand eight hundred and —, and made between the said F. F. and E. his wife of the first part, L. M. of the second part, and N. O. of the third part, and acknowledged the same to be her act and deed. And we do hereby certify, that the said E. was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by us, apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.

G. H.  
I. K.

The attorney or solicitor employed in the transaction will next (as before explained in the case of an acknowledgment before a Judge or Master) make affidavit, verifying the certificate of the perpetual commissioners in the following terms :—

#### IN THE COMMON PLEAS.

A. B., of — in the — of —, Gentleman, one of the attornies [*or*, "solicitors"] of the Court of —, maketh oath and saith, that he knows E., the wife of F. F., in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said E., and the certificate signed by G. H. of — in the — of —, Gentleman, and I. K. of — in the — of —, Gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at — in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of full age and competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that to the best of this deponent's knowledge and belief, the said G. H. [*or*, "I. K."], one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned. And this deponent further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of her the said E., whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in

Affidavit by the  
attorney or solicitor,  
verifying the  
certificate of the  
perpetual commissioners.

**WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
IN ENGLAND.**

Where no provision is to be made this clause to be used.

Where any provision is to be made this clause to be substituted for the preceding, which will of course in such case be omitted.

return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest; of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed [or, "writing"] [or, "that the terms thereof have been reduced into writing"], and that such deed [or, "writing"] has been produced to the said commissioners."'] And lastly, this deponent saith, that it appears by the deed acknowledged by the said E. that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c.*

The subsequent proceedings will be substantially the same as in the case of an acknowledgment before a Judge or Master, as before explained.

It may happen that neither the attorney or solicitor employed, nor any of the commissioners, can satisfactorily speak to the woman's being of full age at the time of the acknowledgment. In such case, the attorney or solicitor will join with himself in the affidavit some other person who can speak to the fact, and who must be thought competent to do so by the individual taking the affidavit as before explained, when treating of an acknowledgment before a Judge or Master. The affidavit itself may be as follows:—

**IN THE COMMON PLEAS.**

Affidavit by the attorney or solicitor and a third person, verifying the certificate of perpetual commissioners.

A. B., of — in the county of — [*state trade, profession, or calling*], and C. D., of — in the county of —, Gentleman, one of the attornies [or, "solicitors"] of the Court of —, severally make oath and say. And first, this deponent A. B. for himself maketh oath and saith, that he knows E., the wife of F. F., in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein

mentioned the said E. was of full age. And the said C. D. for himself maketh oath and saith, that the acknowledgment in the said certificate mentioned was made by the said E., and the certificate signed by G. H. of — in the — of —, Gentleman, and I. K. of — in the — of —, Gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at — in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment, the said E. was of competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said C. D. for himself further saith, that to the best of this deponent's knowledge and belief, the said G. H. [or, "I. K."], one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned. And this deponent the said C. D. for himself further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of her the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest; of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent C. D. for himself further saith, that before her acknowledgment was so taken he was satisfied, and does now verily believe, that such provision has been made by deed [or, "writing"] [or, "that the terms thereof have been reduced into writing"], and that such deed [or, "writing"] has been produced to the said commissioners." ] And lastly, the said C. D. for himself further saith, that it appears by the deed acknowledged by the said E. that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c.*

The subsequent proceedings will be substantially the same as in the case of an acknowledgment before a Judge or Master, as before explained.

WHERE THE  
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MENT IS MADE  
IN ENGLAND.

Where no provision is to be made this clause to be used.

Where any provision is to be made this clause to be substituted for the preceding, which will of course in such case be omitted.

**WHERE THE  
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The attorney or solicitor, if qualified, may be one of the commissioners.

One of the commissioners, if an attorney, may make the affidavit.

Whether the commissioner making the affidavit may also be the attorney or solicitor employed.

By the General Rules of the Court of Common Pleas, the attorney or solicitor employed in the transaction may act as one of the perpetual commissioners, if so appointed by the Chief Justice. But in such case, the other perpetual commissioner must be a stranger to the proceedings, to the end that the examination may be conducted and the certificate granted by at least one independent and impartial public functionary. This seems plain (u).

In *Re Scholefield* (x), Chief Justice Tindal said, "The primary intention of the Court was, that when a married woman acknowledged a deed, she should do it under the sanction of two commissioners and a practising attorney. But afterwards it was thought that one of the commissioners, if a practising attorney, might make the affidavit." And this the Court ruled might be done, provided the other of the commissioners had no interest in the matter, either as an attorney, or solicitor, or as an individual.

In the case, however, where one of the commissioners is the acting attorney or solicitor, a distinction must be attended to—for in such case it will be necessary for the impartial commissioner *alone* to make the preliminary inquiry as to the married woman receiving or not receiving compensation for executing the deed. This inquiry must be in the absence of the other commissioner, who, as being professionally employed in the matter, ought not, any more than the husband, to be present. When this preliminary inquiry, however, as to compensation is completed, the *two* commissioners will (as in the ordinary case of both being impartial) join in the examination of the married woman as to her knowledge of the contents of the deed, and as to her having executed it voluntarily; for the memorandum and certificate must be signed by both commissioners.

(u) See General Rules of H. T. 1834, No. 4, and note thereon, *infra*, p. 41.

(x) 3 Bing. N. C. 293.

The form of affidavit by one of the perpetual commissioners will be as follows :—

WHERE THE  
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#### IN THE COMMON PLEAS.

A. B., of — in the — of —, Gentleman, one of the attorneys [or, "solicitors"] of the Court of —, and one of the commissioners mentioned in the certificate hereunto annexed, maketh oath and saith, that he knows E., the wife of F. F., in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said E., and the certificate signed by this deponent and C. D. of — in the county of —, Gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at — in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of full age and competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that *he this deponent* is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned. And this deponent further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed [or, "writing"] [or, "that the terms thereof have been reduced into writing"], and that such deed [or, "writing"] has been produced to this deponent and the said C. D., the other commissioner."] And lastly, this deponent saith, that it appears by the deed acknowledged by the said E. that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c.*

Affidavit by one of the perpetual commissioners, verifying the certificate of himself and his co-perpetual commissioner.

Should it not be convenient to obtain an affidavit from the disinterested commissioner, this form may be varied by substituting for "he this deponent," the following words: "to the best of this deponent's knowledge and belief the said C. D., the other commissioner."

Where no provision is to be made this clause is to be used.

Where any provision is to be made this clause is to be substituted for the preceding, which will of course in such case be omitted.

WHERE THE  
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The following is the official form of an affidavit where a third person is joined in it with one of the perpetual commissioners :—

#### IN THE COMMON PLEAS.

Affidavit by one  
of the perpetual  
commissioners  
and a third per-  
son.

A. B., of — in the — of — [*state trade, profession, or calling*], and G. H., of — in the — of —, Gentleman, one of the attorneys [*or, "solicitors"*] of the Court of —, and one of the commissioners mentioned in the certificate hereunto annexed, severally make oath and say. And first this deponent A. B. for himself maketh oath and saith, that he knows E., the wife of F. F., in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein mentioned the said E. was of full age. And the said G. H. for himself maketh oath and saith, that the acknowledgment in the said certificate mentioned was made by the said E., and the certificate signed by this deponent and I. K. of — in the — of —, Gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at — in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said G. H. for himself further saith, that *he this deponent* is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned. And this deponent the said G. H. for himself further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of her the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. [*Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent G. H. for himself further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed [or, "writing;"] [or, "that the terms*

Where more convenient, for "he this deponent" may be substituted, "to the best of this deponent's knowledge and belief the said I. K., the other commissioner."

When no provision is to be made, this clause is to be used.

When any provision is to be made this clause is to be substituted for the preceding, which will of course in such case be omitted.

thereof have been reduced into writing,"] and that such deed [or, "writing"] has been produced to this deponent and the said I. K. the other commissioner.") And lastly, the said G. H. for himself further saith, that it appears by the deed acknowledged by the said E. F. that the premises wherein she is stated to be interested, are described to be in the parish of —, in the county of —.

*Sworn, &c.*

WHERE THE  
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SECTION II.

WHERE THE ACKNOWLEDGMENT IS MADE OUT OF ENGLAND.

WHERE THE  
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MENT IS MADE  
OUT OF  
ENGLAND.

1. <i>Instructions for special commission</i> . . . . .	18	6. <i>Notarial certificate</i> . . . . .	22
2. <i>Form of the commission</i> . . . . .	18	7. <i>Form of certificate by notary public or British consul</i> . . . . .	26
3. <i>Memorandum by special commissioners</i> . . . . .	20	8. <i>Affidavit verifying certificate, where a third person is joined in it</i> . . . . .	27
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WHEN the woman whose acknowledgment is to be taken resides out of England, or from any sufficient cause is prevented from attending a Judge or Master, or perpetual commissioners, the Court of Common Pleas, or any judge thereof, may issue a special commission, to be made returnable within such time as shall be thought fit (a).

The attorney or solicitor employed will ascertain who are proper persons, in the place where the woman resides, to be put in the special commission, which will be obtained at the office of the registrar of certificates of acknowledgments. The instructions for the special commission are required to be given on half a sheet of draft paper, in

(a) See the 83rd clause of the Fines and Recoveries Act, *infra*, p. 36; and see General Rules of H. T. 1834, scale of fees, item 12, *infra*, p. 43.

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the following form, the attorney or solicitor bespeaking the commission supplying the proposed commissioners' names, residences, trade, profession, or calling, and such other particulars as may be necessary to complete such instructions:

Instructions for  
a special com-  
mission.

Instructions for a special commission to take the acknowledgment of E., the wife of F. G., now residing at —, in the — of —, Gentleman, of a certain deed of conveyance, whereby it is intended to pass her estate as a married woman.

COMMISSIONERS' NAMES, &c.

A. B., of \_\_\_\_\_ Esq.  
C. D., of \_\_\_\_\_ Merchant.  
G. H., of \_\_\_\_\_ Gent.

To be returnable on \_\_\_\_\_

[Attorney's Name and Address.]

Two commissioners at the least must be named in the commission, and in places far distant it is better to have half a dozen; so that inconvenience may not arise by the death or absence of any of the persons named. The return had better be left blank; *that* being in the discretion of the Judge, the officer always allowing ample time for the purpose. The proceedings before special commissioners will be substantially the same as before a Judge or Master, or perpetual commissioners; except in so far as hereinafter pointed out.

The following is the form of the commission:—

Form of the  
commission.

I, the — Justice of her Majesty's Court of Common Pleas at Westminster, do, by virtue of the statute in that case made and provided, appoint — special commissioners, to take the acknowledgment of —, the wife of —, of any deed by which it is intended — of her the said —, as a married woman, pursuant to the statute 3 & 4 Will. 4, c. 74. And I do order and direct, that this commission shall be executed and returned to the proper officer of the Court, on or before the — day of —.

Dated the — day of —, 184 —.

Entd.



In *Exparte Gill* (b) a commission was addressed to "Judge M'Roberts and W. Pythian," Illinois, in the United States; and was returned certified by "W. Pythian" and "Samuel M'Roberts." The Court required an affidavit, showing the identity of Judge M'Roberts and Samuel M'Roberts.

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In *Re Apperton* (c) the Court allowed a commission to go out for taking the acknowledgment of a married woman at Sydney, New South Wales, with a blank left for her Christian name.

In another case the Court allowed a commission to be amended, under the following circumstances:—It appeared that the acknowledgment had been taken in a remote part of India by two military officers, not mentioned in the commission, all the persons whose names were included in it being absent. The amendment made by order of the Court in this state of things, was to insert in the commission (as returned from India) the names of the two officers who had received the acknowledgment, thus establishing their authority by a retrospective operation (d).

As to the mode of executing a special commission to take the acknowledgment of a married woman, I find no directions either in the Act of Parliament or in the General Rules. Where the thing is practicable, however, I collect that the proper course is *first*, to have the acknowledgment taken in the ordinary way, as already explained; *secondly*, to make the memorandum thereof on the deed; *thirdly*, to get the certificate signed by the special commissioners; *fourthly*, to get it verified by the proper affidavit; and *fifthly*, to get the affidavit itself certified by a notary public. The first, second, and third

(b) 1 Bing. S. 168; 7 Scott, 142.

(c) 1 Man. Gr. & Scott, 447.

(d) *Re Stubbs*, 4 Man. & Gr. 609;

5 Scott, N. S. 327. See this case of  
*Stubbs* more fully stated, *infra*, p. 26.

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items create no difficulty. But the fourth and fifth are often troublesome; for, as regards the fourth item (the making of the affidavit), it may not always be easy to find in foreign parts a person authorised to administer the oath; and as regards the fifth item (the notarial certificate), there may be no notary public at hand capable of officiating. When such embarrassments arise (and they will constantly occur), the endeavour must be to come as near as circumstances will permit to the requirements of the Court, in so far as these are unfolded by the decided cases, of which I will set out the principal; observing, however, in the meantime, that the form of the memorandum of acknowledgment by special commissioners will be as follows:—

Memorandum of  
acknowledgment  
by special com-  
missioners.

This deed marked C. was this day produced before us, and acknowledged by E., the wife of F. F. therein named, to be her act and deed; previous to which acknowledgment the said E. was examined by us, separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her. Dated this — day of —, one thousand eight hundred and —.

In like manner, and perfectly in conformity with the case, where the acknowledgment is before a Judge or Master, or perpetual commissioners, the certificate by special commissioners will be in these terms:—

Certificate by  
special commis-  
sioners.

These are to certify, that on the — day of —, in the year one thousand eight hundred and —, before us the undersigned A. B. and C. D., two of the commissioners specially appointed, pursuant to an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance," for taking the acknowledgment of any deed by E., the wife of F. G., appeared personally the said E., and produced a certain Indenture, marked C., bearing date the — day of —, one thousand eight hundred and —, made between the said F. G. and E. his wife,

of the first part, R. S. of the second part, and T. W. of the third part; and acknowledged the same to be her act and deed. And we do hereby certify that the said E. was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by us, apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

A. B.

C. D.

WHERE THE  
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MENT IS MADE  
OUT OF  
ENGLAND.

The practice is, that one of the special commissioners shall make the following affidavit on parchment (*d*):—

#### IN THE COMMON PLEAS.

A. B. of —, in the — of —, Esquire (*e*), one of the commissioners mentioned in the certificate hereunto annexed, maketh oath and saith, that he knows E., the wife of F. G. in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said E., and the certificate signed by this deponent and C. D. of —, in the county of —, Merchant, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of full age and competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that *he this deponent* is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor or agent, or as clerk to any attorney, solicitor or agent, so interested or concerned. And this deponent further saith, that previous to the said E. making the said acknowledgment, he this deponent inquired of the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her

Affidavit verifying  
the certificate by  
one of the special  
commissioners.

When incon-  
venient for the  
disinterested  
commissioner to  
make the affidavit,  
for "he this de-  
ponent," may be  
substituted "to  
the best of this  
deponent's know-  
ledge and belief  
the said C. D. the  
other commis-  
sioner."

(*d*) One of the special commissioners makes the affidavit, because a practising attorney is not always to be found in foreign parts. And this, moreover, was the course pursued under the old system of Fines and Recoveries.

(*e*) The descriptions of the de-

ponent and of the other special commissioner named in the affidavit, should correspond with their descriptions in the special commission, otherwise difficulty will afterwards be experienced when the time comes for filing.

WHERE THE  
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MENT IS MADE  
OUT OF  
ENGLAND.

Where no pro-  
vision is to be  
made this clause  
to be adopted.

Where any pro-  
vision is to be  
made this clause  
to be substi-  
tuted for the pre-  
ceding, which in  
such case will of  
course be omitted.

in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true (*or*, “declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied and does now verily believe that such provision has been made by deed [*or*, “writing”], [*or*, “that the terms thereof have been reduced into writing”] and that such deed [*or*, “writing”] has been produced to the said commissioners.”) And lastly, this deponent saith, that it appears by the deed acknowledged by the said E., that the premises wherein she is stated to be interested, are described to be in the parish of —, in the county of —.

*Sworn, &c.*

Necessity of a  
notarial certificate  
where attainable.

We now come to the verifying affidavit, which *ought* to be sworn *in the presence of a notary public*, before some magistrate duly authorised to administer oaths; and a notarial certificate on parchment *ought* to accompany, and subsequently be filed with the affidavit. This I say is the general rule; but the Court, in Trinity Term, 1834, directed that affidavits made in France before the consul, vice-consul, or any attorney or attorneys of any one of the Courts at Westminster, should in future be received without the intervention of a notary public. And in Scotland and Ireland the affidavit must be sworn before a Commissioner of the Court of Common Pleas, appointed pursuant to the statute 3 & 4 Will. 4, c. 42, § 42 (*f*), and in such case also no notary public is required.

It is held, that under the 6 Geo. 4, c. 87, § 20, a British consul has the same power as a notary public to certify

(*f*) See *Re Anderson*, 2 Scott, 626; 2 Bing. N. S. 435.

the verifying affidavit (*g*). But before proceeding to give the form of such certificate by a notary public or British consul, we will state the decisions of the Court of Common Pleas upon the form and substance of the affidavit itself.

WHERE THE  
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And first, as to the form of the affidavit, the Court, in *Re Shaw* (*h*), allowed an affidavit made in Philadelphia to be filed, although it was not in the form prescribed by the General Rules (*i*), but commenced with the words, "Be it remembered," and afterwards assumed the form of an affidavit. The affidavit in this case, however, was one on which perjury could be assigned.

An affidavit, verifying the certificate of special commissioners in Illinois, although only taken before a notary public, was held sufficient; another affidavit stating that such was at that place the practice (*k*). So, an affidavit sworn before a notary public in Germany, was deemed sufficient (*l*). So likewise an affidavit sworn before "the Provisional British Consul for the Society Islands;" it appearing that there was no notary or other official person before whom it could be sworn, within many hundred miles (*m*). So, an affidavit sworn before the Minister of the British Chapel at Moscow, who was in the habit of administering oaths to British subjects in that place, there being no notary public or British consul, or vice-consul, within four hundred miles (*n*). Again, an affidavit sworn in Russia, before the British consul, was held sufficient, it having been stated in a notarial certificate, that the laws

(*g*) *Re Mrs. Barber*, 2 Bing. N. C. 268; S. C. 2 Scott, 436. The clause of the Act says, that every foreign consul general, or consul, shall have power to do all such notarial acts as any notary public may do.

(*h*) 3 Man. & Gr. 237; 9 Dow. 839.

(*i*) General Rules of H. T. 1834. See *infra*, p. 44.

(*k*) *Ex parte Mann*, 5 Bing. N. C. 226.

(*l*) 1 Man. & Gr. 973.

(*m*) *Re Rebecca Darling*, 2 Man. Gr. & Scott, 848.

(*n*) *Re Pickersgill*, 6 Man. & Gr. 250.

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of Russia did not grant to magistrates authority to administer oaths (o).

But there are limits to the indulgence of the Court. Thus, in *Re Street* (p), permission to file an affidavit and notarial certificate was refused; the affidavit purporting to be sworn before one "G., a commissioner for taking affidavits in the Court of Queen's Bench for Canada West;" and the notary certifying him to be a commissioner of *that* Court, and *as such* qualified to administer oaths.

Another case, *Ex parte Birch* (q), is thus stated in the report: "Two married women executed a deed at Hamburg; the affidavit, verifying the commissioner's certificate, was administered by the præfect in German, which was translated into English by the deponent himself, as the oath was administered and the affidavit was verified by a notary public and the English consul, but not signed by the deponent; the practice at Hamburg being that an affidavit shall not be signed. There was also an affidavit that the magistrates at Hamburg will not administer an oath in English. Upon the application of Wilde, Serjeant, to file the certificate, the Court acquiesced, upon condition that the applicant should produce the affidavit of a merchant here that it is not usual at Hamburg for affidavits to be signed by the deponent" (r).

In *Re Eady* (s), it was held that an affidavit made in Germany, verifying the certificate of acknowledgment of a married woman resident in that country, should be made, not before the British consul, but before a native court.

(o) *Davy and Maltwood*, 2 Man. & Gr. 424; 2 Scott, N. R. 523.

(p) 2 Man. Gr. & Scott, 364.

(q) 4 Bing. N. C. 394; 6 Scott, 185.

(r) The above is from Mr. Bing-

ham's Report. According to Mr. Scott, all that the Court did, was to receive an affidavit *not signed by the deponent*.

(s) 6 Dow. 615.

It was also held to be no objection to the affidavit that it was originally in the German language, if it were translated, and the translation verified by a notary. The oath, too, might likewise be administered in German, if it were interpreted to the deponent.

WHERE THE  
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ENGLAND.

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It is not actually necessary (though surely very proper) to specify in the verifying affidavit the place where the acknowledgment has been taken (*t*).

When a notarial certificate cannot be had, the want of it ought to be accounted for by affidavit, when practicable. In such a case there will be two affidavits, namely, the common affidavit, verifying the commissioner's certificate, and another affidavit for the purpose of excusing the omission of the notarial certificate. In *Re Warburton* (*u*) the common affidavit verifying the commissioners' certificate was sworn by one of the commissioners before a magistrate having the requisite authority to administer an oath, and was in that and all other respects perfectly correct and sufficient. But an affidavit which was made by the same commissioner (for the purpose of excusing the want of a notarial certificate) erroneously represented the first affidavit as having been made by the *other* commissioner, whereas both affidavits were by the *same* commissioner. In these circumstances the Court did not consider the blunder in the second affidavit fatal. It was in other respects satisfactory, for it showed the authority of the magistrate taking the first affidavit, and it sufficiently accounted for the want of a notarial certificate.

The Court, in *Re Way* (*x*), upon an acknowledgment taken in a township in Pennsylvania, received (in lieu of

(*t*) *Re Shuffelbottom*, 6 Scott, 185.  
The rule is different where the acknowledgment is taken in England.  
There the place *must* be mentioned.

(*u*) 3 Man. & Gr. 638; S.C. 4 Scott, N. S. 328.

(*x*) 6 Man. & Gr. 1046.

WHERE THE  
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ENGLAND.

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a notarial certificate) a certificate by an officer describing himself as "the Prothonotary and Clerk of Common Pleas in and for the Centre County Pennsylvania;" it being sworn that there was no notary public within eighty miles of the place.

In *Re Stubbs*, before cited (y), where a commission had been executed in a remote part of India, a notarial certificate was dispensed with, and a verifying affidavit was received by one of the military officers (acting as special commissioners), sworn before an officer, who was a political superintendent on the spot, it appearing from his certificate, and from a letter of one of the persons who took the acknowledgment, that all the officers to whom the commission was addressed were more than a thousand miles from the place where the commission had to be performed; and that, if any new special commissioners were appointed, they would probably be removed before the commission could reach its destination; and that there was no notary public or magistrate, before whom an oath could be taken, within several hundred miles.

It has been erroneously stated that the affidavit verifying the certificate of special commissioners may be filed subsequently to the filing of the certificate itself (z). The case in which this is laid down shows, by its own statement, that the point was misunderstood by the reporter. A certificate can in no case be filed without an affidavit verifying it. The words of the Act are express, and the practice of the office is uniform.

The form of the certificate by a notary public, or British consul, will be as follows:—

Form of certificate  
by a notary public  
or British consul.

I, L. M., notary public, of lawful authority, admitted and sworn,  
dwelling at — [or, "I, L. M., British consul"—*here insert his*

(y) *Supra*, p. 19.

(z) Anonymous case, 1 Scott, 52.



*proper description*], hereby certify that A. B., of —, in the — of —, Esquire, on the — day of —, one thousand eight hundred and —, was sworn in my presence to the truth of the affidavit hereunto annexed, by and before H. I., at —. And I do hereby certify that the said H. I. is a justice of the peace [*or whatever his qualification may be to administer oaths*], and is qualified to administer oaths at — aforesaid; and that the name A. B. subscribed to the said affidavit, and also the name H. I. subscribed to the jurat thereof, are of the respective proper handwriting of the said A. B. and H. I., and were respectively signed by them in my presence. In testimony whereof I have hereunto set my hand and notarial [*or, "consular"*] seal. Dated the — day of —, one thousand eight hundred and —.

L. M.

L. S.

WHERE THE  
ACKNOWLEDG-  
MENT IS MADE  
OUT OF  
ENGLAND.

When it is necessary or desirable to have evidence of identity and full age from a third person, such third person may be joined in the affidavit with the special commissioner, as follows:—

## IN THE COMMON PLEAS.

A. B., of —, in the — of — [*state trade, profession, or calling*], and G. H., of —, in the — of —, Gentleman, one of the commissioners mentioned in the certificate hereunto annexed, severally make oath and say. And first this deponent A. B. for himself maketh oath and saith, that he knows E., the wife of F. G., in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein mentioned the said E. was of full age. And the said G. H. for himself maketh oath and saith, that the acknowledgment in the said certificate mentioned was made by the said E., and the certificate signed by this deponent and I. K., of —, in the — of —, Gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. was of competent understanding, and that the said E. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said G. H. for himself further saith, that *he this deponent* is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And this deponent the said G. H. for himself further saith, that previous to the said E. making the said

Affidavit verifying  
the certificate by  
one of the special  
commissioners  
and a third per-  
son.

Where incon-  
venient to make  
the affidavit in  
this form, for "*he  
this deponent,*"  
may be substi-  
tuted, "*to the  
best of this de-*

WHERE THE  
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MENT IS MADE  
OUT OF  
ENGLAND.

ponent's know-  
ledge and belief  
the said J. K. the  
other commis-  
sioner."

Where no pro-  
vision is to be  
made.

Where any pro-  
vision is to be  
made.

acknowledgment, he this deponent inquired of her the said E. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. declared that she did intend to give up her interest in the said estates without having any provision made for her, in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said E. this deponent has no reason to doubt the truth, and he verily believes the same to be true. (Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent G. H. for himself further saith, that before her acknowledgment was so taken, he was satisfied and does now verily believe that such provision has been made by deed [or "writing"] [or, "that the terms thereof have been reduced into writing"], and that such deed ["or writing"] has been produced to this deponent and the said I. K., [the other commissioner.]) And lastly, the said G. H. for himself further saith, that it appears by the deed acknowledged by the said E. F., that the premises wherein she is stated to be interested are described to be in the parish of —, in the county of —.

*Sworn, &c.*

In such case the certificate by the notary public, or British consul, will be as follows :—

Form of certificate  
by a notary public  
or British consul  
when the affidavit  
is by two de-  
ponents.

I, L. M., notary public, of lawful authority, admitted and sworn, dwelling at — [or, "I, L. M., British consul"—*here insert his proper description*], hereby certify that A. B., of —, in the — of —, and G. H. of —, in the — of —, Gentleman, on the — of —, one thousand eight hundred and —, were severally sworn in my presence to the truth of the affidavit hereunto annexed, by and before H. I., at —. And I do hereby certify that the said H. I. is a justice of the peace [*or whatever his qualification may be to administer oaths*], and is qualified to administer oaths at — aforesaid; and that the names A. B. and G. H. severally subscribed to the said affidavit, and also the name H. I. subscribed to the jurat thereof, are of the respective proper handwriting of the said A. B., G. H., and H. I., and were respectively signed by them in my presence. In testimony whereof I have hereunto set my hand and notarial [*or "consular"*] seal. Dated the — day of —, one thousand eight hundred and —.

SECTION III.  
MISCELLANEOUS CASES.

MISCELLANEOUS  
CASES.

1. <i>Where the acknowledgment is by more than one married woman</i> . . . . .	29	4. <i>Affidavit</i> . . . . .	30
2. <i>Memorandum in such a case</i> . . . . .	29	5. <i>Case where the woman was deaf and dumb</i> . . . . .	31
3. <i>Certificate</i> . . . . .	30	6. <i>Certificate</i> . . . . .	31
		7. <i>Affidavit</i> . . . . .	32

HAVING thus endeavoured to explain the different courses of procedure upon taking acknowledgments before a Judge, or Master, or perpetual commissioners at home, and before special commissioners in foreign parts, it only remains to give one or two forms, which may be found useful under circumstances alike liable to occur in England and out of England.

Thus it may happen that the acknowledgment of the deed is to be made by more than one married woman. The following are forms applicable to such a case before a Judge or Master, which may of course be adapted to a similar case when occurring before perpetual or special commissioners.

Where the acknowledgment is by more than one married woman.

MEMORANDUM to be indorsed on Deed where more than one married Woman acknowledges before a Judge or Master.

Memorandum in such a case.

This deed marked A. was this day produced before me, and acknowledged by E. the wife of F. F., M. the wife of J. G., and S. the wife of T. W., severally therein named, to be the act and deed of each of them the said E., M., and S.; previous to which acknowledgment each of them, the said E., M., and S., was examined by me separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and each of them declared the same to be freely and voluntarily executed by her. Dated this — day of —, one thousand eight hundred and —.

MISCELLANEOUS CASES. **CERTIFICATE by Judge or Master, where more than one married Woman acknowledges.**

Certificate.

These are to certify that on the — day of —, in the year one thousand eight hundred and —, before me the undersigned, Sir Thomas Wilde, Knight, Lord Chief Justice of the Court of Common Pleas at Westminster [*or*, “before me, Sir John Patteson, Knight, one of the Justices of the Court of Queen’s Bench at Westminster;” *or*, “before me the undersigned, Sir George Rose, Knight, one of the Masters in Ordinary of the Court of Chancery”], appeared personally, E. the wife of F. F., M. the wife of J. G., and S. the wife of T. W., and produced a certain indenture marked A., bearing date the — day of —, one thousand eight hundred and —, and made between the said F. F. and E. his wife, J. G. and M. his wife, and T. W. and S. his wife, of the first part, L. M. of the second part, and T. P. of the third part; and each of them acknowledged the same to be her act and deed. And I do hereby certify that each of them, the said E. M. and S., was at the time of her acknowledging the said deed of full age and competent understanding, and that each of them was examined by me apart from her husband, touching her knowledge of the contents of the said deed, and that each of them freely and voluntarily consented to the same.

**AFFIDAVIT, verifying Certificate by Judge or Master, where acknowledgment made by more than one married woman.**

**IN THE COMMON PLEAS.**

Affidavit.

A. B., of —, in the — of —, Gentleman, one of the attornies [*or*, “solicitors”] of the Court of —, maketh oath and saith, that he knows E., the wife of F. F., M., the wife of J. G., and S., the wife of T. W., in the certificate hereunto annexed respectively mentioned, and that the acknowledgment therein mentioned was made by each of them, the said E. M. and S., and the certificate signed by the Judge [*or*, “Master”] in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that, at the time of making such acknowledgment, each of them, the said E. M. and S., was of full age and competent understanding, and that each of them, the said E. M. and S., knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that, previous to the said E. M. and S. severally making the said acknowledgment, he this deponent inquired of each of them, the said E. M. and S., whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in

consequence of her so giving up her interest in such estates, and that in answer to such inquiry each of them, the said E. M. and S., declared that she did intend to give up her interest in the said estates, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of each of them, the said E. M. and S., this deponent has no reason to doubt the truth, and he verily believes the same to be true. (*Or*, "declared that a provision was to be made for her in consequence of her giving such her interest in the said estates. And this deponent further saith, that before the said acknowledgment was so taken, he was satisfied and does now verily believe that such provision has been made by deed [*or*, "writing"]; [*or*, "that the terms thereof have been reduced into writing"] and that such deed [*or*, "writing"] has been produced to the said Judge [*or*, "Master"]"). And lastly, this deponent saith, that it appears, by the deed acknowledged by the said E. M. and S., that the premises wherein each of them is stated to be interested, are described to be in the parish of —, in the county of —.

*Sworn.*

MISCELLANEOUS  
CASES.

Without provision.

With provision.

It happened, in one reported case (*b*), that the woman, whose acknowledgment was to be taken, was both deaf and dumb. The Court directed the filing to take place; it appearing that the nature of the transaction had been duly explained to her by signs, and that she had, likewise by signs, signified her assent, these facts being duly established by the certificate and affidavit. The following are the forms of the certificate and affidavit in such a case: (*c*)—

Case where the woman was deaf and dumb.

CERTIFICATE by perpetual Commissioners of acknowledgment by deaf and dumb Woman.

These are to certify, that on the seventh day of October, in the year one thousand eight hundred and forty-three, before us, A. P. and R. M. W., two of the perpetual Commissioners appointed for the county of Lancaster, for taking the acknowledgments of deeds by married women, pursuant to an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance," appeared personally E. the wife of D. W., S. the wife of S. H., and E. the wife of J. D., and produced a certain Indenture of

Certificate.

(*b*) *Re Harper*, 6 Man. & Gr. 732;  
7 Scott, N. R. 431.

(*c*) The form of the memorandum

of acknowledgment in such a case  
may be collected from the terms of  
the certificate.

MISCELLANEOUS  
CASES.

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Release, marked W., bearing date the seventh day of October instant, and made between the said D. W. and E. his wife of the first part, R. L. and J. his wife of the second part, the said S. H. and S. his wife of the third part, the said J. D. and E. his wife of the fourth part, and M. W. of the fifth part, and each of them acknowledged the same to be her act and deed. And we do hereby certify, that each of them, the said E. W., S. H., and E. D., was at the time of her acknowledging the said deed, of full age and competent understanding, and that each of them was examined by us apart from her husband, touching her knowledge of the contents of the said deed, and that each of them, the said E. W. and E. D., freely and voluntarily consented to the same. And we further certify, that the said S. H. being deaf and dumb, the nature, purport, and contents of the said deed, previous to her acknowledgment thereof, was fully explained to her in our presence by W. W., being a person accustomed to and competent to hold conversation by signs with the said S. H., and that from such explanation and the interpretation thereof to us by the said W. W., we further certify, that the said S. H. freely and voluntarily consented to the same.

A. P.

R. M. W.

AFFIDAVIT, verifying the above Certificate.

IN THE COMMON PLEAS.

Affidavit.

J. O., of Manchester, in the county of Lancaster, Gentleman, one of the attornies of the Court of Queen's Bench, and W. W. of Manchester, aforesaid, stocking maker, severally make oath and say. And first this deponent J. O. for himself saith, that he knows E. the wife of D. W., S. the wife of S. H., and E. the wife of J. D., in the certificate hereunto annexed severally mentioned, and that the acknowledgment therein mentioned was made by the said E. W., S. H., and E. D., and the certificate signed by A. P. and R. M. W., both of Manchester aforesaid, Gentlemen, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at Manchester aforesaid, in the presence of this deponent, and that at the time of making such acknowledgment, each of them, the said E. W., S. H., and E. D., was of full age and competent understanding, and that each of them, the said E. W., S. H., and E. D., knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made; and this deponent J. O. for himself further saith, that to the best of this deponent's knowledge and belief, neither of the said Commissioners is in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and this deponent J. O. further

saith, that, previous to the said E. W. and E. D. making the said acknowledgment, he this deponent inquired of each of them the said E. W. and E. D., whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry, each of them the said E. W. and E. D. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of each of them the said E. W. and E. D. this deponent has no reason to doubt the truth, and verily believes the same to be true : and this deponent J. O. further saith, that the said S. H. is deaf and dumb, and that previous to the said S. H. making the said acknowledgment, he this deponent explained to the said W. W. the nature and purport of the said deed, and requested him to inquire by signs of the said S. H. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that the said W. W., by signs, made such inquiry, and that in answer thereto the said S. H. by signs signified that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said S. H. this deponent has no reason to doubt the truth, and he verily believes the same to be true ; and this deponent W. W. for himself saith, that he is the nephew of the said S. H., and that he can neither read nor write ; and this deponent W. W. further saith, that he has long been accustomed to communicate and converse with, and convey information to, and receive information from the said S. H. by signs, and that he did at the request of the said J. O. explain by signs to the said S. H. the nature and purport of the said deed, and inquired of her by signs whether she understood the same, and whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and in answer to such inquiries so made by signs as aforesaid the said S. H. signified that she did understand the said deed, and that she did so intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest. And this deponent W. W. further saith, that he communicated to the said J. O., and also to the said Commissioners, the real, true, and bonâ fide answers and meaning of the said S. H. to such

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their aforesaid inquiries. And lastly, this deponent J. O. saith, that it appears by the deed acknowledged by the said E. W., S. H., and E. D., that the premises wherein each of them is stated to be interested are described to be in Manchester, in the county of Lancaster.

Sworn at Manchester aforesaid, by both the deponents, J. O. and W. W., this seventh day of October, 1843, this affidavit having been previously read over and explained to the deponent W. W., who appeared perfectly to understand the same, and made his mark thereto in my presence.

J. O.

W. <sup>his</sup> × W.  
mark.

J. G.,

*A Commissioner for taking Affidavits in the Court of Common Pleas at Westminster.*

## SECTION IV.

CLAUSES OF THE  
FINES AND RE-  
COVERIES ACT.

## CLAUSES OF THE ACT AND GENERAL RULES, &amp;c.

- |  |   |
|--|---|
| 1. <i>Clauses of the Fines and Recoveries Act</i> . . . . . 34 | 3. <i>General Rules of Trinity Term, 1834</i> . . . . . 45                  |
| 2. <i>General Rules of Hilary Term, 1834</i> . . . . . 40      | 4. <i>List of the jurisdictions of perpetual commissioners</i> . . . . . 46 |

## GENERAL ENABLING CLAUSE.

A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein: and to release and extinguish powers, as a feme sole.

77. AND be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case (except that of being tenant in tail, for which provision is already made by this act,) by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband, in her right, may have in any lands of any tenure, or in any such money as aforesaid (a), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the

(a) Contingent and other like interests and rights of entry, and disclaimers of interests of married

women, are made alienable by deed under the 8 & 9 Vict. c. 106.



deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed : Provided always, that this act shall not extend to lands held by copy of court-roll of or to which a married woman, or she and her husband, in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

CLAUSES OF THE  
FINES AND RE-  
COVERIES ACT.

Not to extend to  
copyholds in cer-  
tain cases.

#### SAVING OF POWERS.

78. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

The powers of  
disposition given  
to a married  
woman by this  
act not to inter-  
fere with any  
other powers.

#### ACKNOWLEDGMENT OF DEEDS.

79. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided.

Every deed by a  
married woman,  
not executed by  
her as protector,  
to be acknow-  
ledged by her be-  
fore a judge, &c.

#### SEPARATE EXAMINATION.

80. And be it further enacted, That such judge, Master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed ; and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same ; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

The judge, &c.,  
before receiving  
such acknowledg-  
ment, to examine  
her apart from  
her husband.

#### PERPETUAL COMMISSIONERS.

81. And be it further enacted, That, for the purpose of providing convenient means of taking acknowledgments by married women of

As to the appoint-  
ment of perpetual  
commissioners

CLAUSES OF THE  
FINES AND RE-  
COVERIES ACT.

for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice ; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned ; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same ; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

## POWER OF PERPETUAL COMMISSIONERS.

Power of perpetual commissioners not confined to any particular place.

82. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

## SPECIAL COMMISSIONERS.

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

83. And be it further enacted, That, in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a Master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid : Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

## MEMORANDUM OF ACKNOWLEDGMENT.

84. And be it further enacted, That, when a married woman shall acknowledge any such deed as aforesaid, the judge, Master in Chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—

“This deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced before me [*or*, “us”] and acknowledged by — therein named to be her act and deed; previous to which acknowledgment the said — was examined by me [*or*, “us”] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.”

## SEPARATE CERTIFICATE OF ACKNOWLEDGMENT.

And the same judge, Master in Chancery, or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—

“These are to certify, that on the — day of — in the year one thousand eight hundred and —, before me the undersigned Sir *Nicolas Conyngham Tindal*, Lord Chief Justice of the Court of Common Pleas at Westminster, [*or*, “before me Sir *James Parke*, Knight, one of the justices of the Court of King's Bench at Westminster;” *or*, “before me the undersigned *James William Farrer*, one of the Masters in Ordinary of the Court of Chancery;” *or*, “before us *A. B.* and *C. D.*, two of the perpetual commissioners appointed for the — for taking the acknowledgments of deeds by married women, pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled, An Act [*insert the title of this act*];” *or*, “before us the undersigned *A. B.* and *C. D.*, two of the commissioners specially appointed pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled, An Act [*insert the title of this act*], for taking the acknowledgment of any deed by —, the wife of —,” appeared personally —, the wife of —, and produced a certain indenture, marked [*here add the mark*], bearing date the — day of —, and made between [*insert the names of the parties*], and acknowledged the same to be her act and deed: And I [*or*, “we”] do hereby certify, that the said — was, at the time of her acknowledging

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When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned;

and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

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the said deed, of full age and competent understanding, and that she was examined by me [or, "us"], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same."

**FILING CERTIFICATE WITH AN AFFIDAVIT TO VERIFY IT.**

Certificate with affidavit verifying the same to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court.

85. And be it further enacted, That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or Master in Chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas.

**EFFECT OF FILING CERTIFICATE—RELATION BACK.**

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

86. And be it further enacted, That when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

**INDEX OF CERTIFICATES.**

The officer with whom the certificates are lodged to make an index of the same.

87. And be it further enacted, That the officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient: and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

## COPIES OF CERTIFICATES—EVIDENCE.

88. And be it further enacted, That, after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

CLAUSES OF THE  
FINES AND RE-  
COVERIES ACT.

Officer to deliver  
a copy of certi-  
cate filed, which  
shall be evidence.

## POWER OF THE COURT OF COMMON PLEAS DEFINED.

89. And be it further enacted, That the Lord Chief Justice of the Court of Common Pleas at Westminster, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

Chief Justice of  
Common Pleas to  
appoint the  
officer with whom  
the certificates  
shall be lodged;  
and the Court to  
make orders  
touching the ex-  
amination, me-  
morandums,  
certificates, affi-  
davits, &c.

## COPYHOLDS—EQUITABLE INTERESTS.

90. And be it further enacted, That, in every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court-roll, parcel of the manor, and in which she alone, or she and her husband, in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband, in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the persons taking the surrender, are hereby declared to be good and valid.

A married woman  
to be separately  
examined on the  
surrender of an  
equitable estate  
in copyholds, as  
if such estate were  
legal.

GENERAL RULES  
OF THE  
COMMON PLEAS.

GENERAL RULES BY THE COURT OF COMMON PLEAS,

FOR TAKING

THE ACKNOWLEDGMENTS OF MARRIED WOMEN.

MADE IN HILARY TERM, 1834.

Preamble, That alterations in former General Rules of Michaelmas Term, 1833, necessary.

That it will be convenient to incorporate all the orders and regulations in one rule.

General Rules of Michaelmas Term, 1833, revoked, but not to invalidate proceedings had pursuant thereto before March 1, 1834.

In taking an acknowledgment, one of the commissioners at least must be a person not having any interest in the transaction or concerned therein as attorney, &c.

Before taking any acknowledgment, the commissioners (or one of them not interested or concerned as aforesaid) shall inquire of the wife, apart from her husband, and likewise apart from the attorney acting in the matter, whether she intends to give up her interest without a pro-

WHEREAS it has been found expedient to make alterations in the General Rules made in Michaelmas Term last by this Court, for the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, chapter 74, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance:"

And whereas it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient that all the orders and regulations made by the Court under the said act should be contained in the same rule:—

1. Now it is hereby ordered, That the said General Rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which, before the first day of March next ensuing, shall have been taken pursuant to the direction of the said rules of Michaelmas Term last.

2. And it is hereby further ordered, That where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

3. And it is further ordered, That before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed without having any provision made for her in lieu of or in return for or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest

without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment: but if it shall appear to them, or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them; or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provisions to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

*they are satisfied that such provision has been made by some deed or writing to be produced to them. If such provision, however, shall not have been made at the time of the acknowledgment, the commissioners shall require the terms of the intended provisions to be put in writing, and shall verify the same. This appears to throw on the commissioners the duty of judging how far the provisions for the wife are properly secured, which is going beyond the objects of the act.*

4. And it is hereby further ordered, That the affidavit verifying the certificate to be made pursuant to the said act (and which certificate shall be in the form contained in the said act) shall, except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed, be made by some practising attorney or solicitor of one of the courts at Westminster, or one of the counties palatine of Lancaster or Durham; and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent, or (if more than one person join in the affidavit) that one or more of the deponents knew the person or persons making such acknowledgment; and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding: and that one at least of the commissioners taking such acknowledgment, to the best of his deponent's knowledge and belief, is not in any manner interested in the transaction giving occasion to the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: And that previously to such acknowledgment being taken, the deponent had inquired of such married woman (or if more than one, of each of such married women), whether she intended to give up her interest in the estate to be passed; and also the answer given thereto; and where any such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be

#### GENERAL RULES OF THE COMMON PLEAS.

vision in lieu thereof; and when she shall answer in the affirmative so as to leave no doubt of the truth of her declaration, her acknowledgment is to be received. But if it appear that she is to have a provision, the commissioners are not to take her acknowledgment, till

The certificate of the commissioners shall be in the form contained in the act in all cases where the acknowledgment is taken in England, Wales, or Berwick-upon-Tweed; and the affidavit verifying the certificate shall be by some practising attorney or solicitor. Besides verifying the certificate, the affidavit must state that the deponent (or if more than one person join in it, that one or more of the deponents) knew the person or persons acknowledging; and that at the time of the acknowledgment the person or persons acknowledging was or were of full age and competent understanding. The affidavit must further state, that at least one of the commissioners was free from interest and professional concern in the transaction. It must also set forth the names

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and residences of  
the commission-  
ers, and the place  
or places of tak-  
ing the acknowledgments.

And that the deponent had inquired of the person acknowledging (or if more than one, of each of them), whether she intended to give up her interest in the estate to be passed; her answer to such inquiry; and where she declared her intention to be that she should give up her interest without receiving any provision in lieu thereof, the deponent must state that he has no reason to doubt the truth of such declaration, and that he believes the same to be true. Where a provision has been agreed upon, the deponent shall state that the same is by deed or writing; or if not then made, that the terms of such agreement have been reduced to writing, adding his belief that such deed or writing has been produced to the judge, Master, or commissioners by whom the acknowledgment has been received.

The affidavit  
must set forth the  
parish or parishes,  
place or places,  
and county or  
counties, in which  
the premises  
wherein the wife  
shall appear to  
be interested is

“by deed described to be situate.” This clause is rendered obscure by something more than an unhappy confusion of tenses, which in fact pervades all the orders. Stripped of expletives, the meaning seems to be that the affidavit shall specify the place (distinguishing it by parish and county) in which the premises in question are by the deed in question described to be situate. But it has not been the practice to require that any locality should be stated unless stated in the deed. It frequently happens that the description in the deed is very general, as in the case of the residuary estate of a testator, in which case the premises are described in the affidavit merely in the words of the deed for the purpose of showing what is actually passed by it.

Annexed form of  
affidavit to be fol-  
lowed, subject to  
proper variations.  
When convenient,  
one of the com-  
missioners may  
make the affidavit.

The certificates  
and affidavits to  
be lodged with  
the proper officer  
within a month;  
that is to say,  
be it observed, a  
lunar month. An  
order to file may  
be obtained as of  
course at any time within six months. But after the expiration of six months, it is the  
practice to require an affidavit explanatory of the circumstances.

Fees and charges.

true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (Judge, Master, or) commissioners.

5. And it is hereby further ordered, That the affidavit shall state the parish or several parishes, or place or several places, and the county or counties, in which the several premises wherein any such married woman shall appear to be interested shall by deed be described to be situate.

6. And it is hereby further ordered, That the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made, where it is found convenient, by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf.

7. And it is hereby further ordered, That the certificates and affidavits verifying the same shall within one month from the making the acknowledgment be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the Court or a judge.

8. And it is hereby further ordered, That the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said Court, and for taking acknowledgments (a) of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

(a) See Rules of Trinity Term, 1834, *infra*, p. 45.



£ s. d. GENERAL RULES  
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1. To a Judge or Master for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a Master, the whole will be paid over to the treasury, or the fee fund account of the Court of Chancery . . . 1 6 8
2. To the two perpetual commissioners, for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13s. 4d. for each commissioner . . . 1 6 8
3. To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses . . . 1 1 0
4. To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses . . . 2 2 0
5. To the clerk of the peace, or his deputy, for every search 0 1 0
6. To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of one hundred names . . . 0 5 0
7. To the same, for every further complete number of fifty names, an additional . . . 0 2 6
8. To the officer, for every search . . . 0 1 0
9. To the same, for every official copy of the certificate . . . 0 2 6
10. To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of one hundred names . . . 0 5 0
11. To the same, for every further complete number of fifty names, an additional . . . 0 2 6
12. To the same, for preparing every special commission (b), including a fee of 5s. to the clerk of the chief justice or other judge, for the fiat . . . 0 15 0
13. To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said Act of the 3 & 4 Will. 4, c. 74. . . 0 5 0

And it is hereby further ordered, That the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court-rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land

(b) This is the only mention to be found in the Rules of Court respecting the duty imposed on the officer of preparing special commissions.

GENERAL RULES  
OF THE  
COMMON PLEAS.

held by copy of court-roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court-roll, and for entries of such surrenders, or the memorandums thereof, on the court-rolls, shall be as follows:—

	£	s.	d.
For the indorsements on the deed of the memorandum of production and memorandum of entry on court-rolls, to be signed by the lord, steward, or deputy steward, each indorsement of memorandum 5s., together . . . . .	0	10	0
For the entries on the court-rolls of deeds, and the indorsements thereon, at per folio of 72 words . . . . .	0	0	6
For taking the consent of each protector of settlement of lands . . . . .	0	13	4
For taking the surrender by each tenant in tail of lands . . . . .	0	13	4
For entries of such surrenders, or the memorandums thereof, on the court-rolls, at per folio of 72 words . . . . .	0	0	6

N. C. TINDAL.  
J. A. PARKE.  
J. B. BOSANQUET.  
E. H. ALDERSON.

FORM OF AFFIDAVIT (c) verifying the Certificate of Acknowledgment taken in pursuance of the Act of Parliament, to be made by some practising attorney or solicitor, and to be sworn before a judge of the Court of Common Pleas, or a commissioner appointed for taking affidavits in the said Court.

IN THE COMMON PLEAS.

A. B., of — in the — of —, Gentleman, one of the attorneys [or, “solicitors”] of the Court of —, maketh oath and saith, that he knows — the wife of — in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the Judge or Master, or by A. B. of &c., and C. D. of &c., the commissioners in the said certificate mentioned, on the day and year therein mentioned, at — in the — of — in the presence of this deponent, and that at the time of making such acknowledgment the said — was of full age and competent understanding, and that the said — knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. [“And this deponent further saith, that to the best of this deponent’s knowledge and belief, neither

This is to be  
omitted when ac-  
knowledgegment

(c) Annexed to the above General Rules and required to be followed. See General Rule, No. 6, *supra*, Appendix, p. 42.

of the said commissioners is [*or*, "the said A. B. or the said C. D., one of the said commissioners, is not"] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned."] And this deponent further saith, that previous to the said — [*the married woman*] making the said acknowledgment, he this deponent inquired of the said — [*the married woman*], (*or, if more than one*, "of each of them the said — and — [*the married women*]" ), whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said — [*the married woman*] declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest ; of which declaration of the said — [*the married woman*] this deponent has no reason to doubt the truth, and verily believes the same to be true ; [*or*, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates"]. And this deponent lastly saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said Judge, Master, or commissioners. And lastly, this deponent saith, that it appears by the deed acknowledged by the said — [*the married woman*] that the premises wherein she is stated to be interested are described to be in the parish or place of — [*or*, "parishes or places of —"], and — in the county of — [*or*, "counties of —" (as the case may be)].

*Sworn, &c.*

N.B. When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

#### GENERAL RULES MADE BY THE COURT OF COMMON PLEAS IN TRINITY TERM, 1834.

1. It is ordered, That, from and after the last day of this Term, where such parts of the affidavit verifying the certificate of acknowledgment taken in pursuance of the late act of Parliament respecting

#### GENERAL RULES OF THE COMMON PLEAS.

taken by a Judge  
or master.

Where the fact of  
knowledge of the  
married woman,  
and of her being

**GENERAL RULES  
OF THE  
COMMON PLEAS.**

of full age cannot be deposed to by a commissioner, or by an attorney, &c., it may be deposed to by some other competent person, and the competency of such person is to be determined by the person administering the oath, that is to say, by a judge of one of the superior courts, or by a commissioner appointed for taking affidavits in the Court of Common Pleas.

Where more than one acknowledgment is taken, the fees authorised to be charged for first only.

The fees for the other acknowledgments to be one-half of the original fees.

All acknowledgments in such cases to be included in one certificate and one affidavit.

Lease and release to be considered as one acknowledgment.

finer and recoveries, as state "the deponent's knowledge of the party making the acknowledgment and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

2. And it is further ordered, That where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only.

3. And the fees to be taken for the other acknowledgments or acknowledgments, how many soever the same may be, shall be one-half of the original fees; and so also where the same married women shall at the same time acknowledge more than one deed respecting the same property.

4. And where in either of the above cases there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

5. In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

**LIST OF THE JURISDICTIONS OF PERPETUAL  
COMMISSIONERS.**

*County of Anglesey.*

" Bedford.

" Berks.

" Brecknock.

" Buckingham.

" Cambridge.

" Cardigan.

" Carmarthen.

*County of the Borough of Carmarthen.*

*County of Carnarvon.*

" Chester.

*City of Chester.*

*County of Cornwall.*

" Cumberland.

" Denbigh.

*County of Derby.*

" Devon.

*City and County of the City of Exeter.*

*County of Dorset.*

*Town and County of the Town of Poole.*

*County of Durham.*

*City of Durham.*

*County of Essex.*

" Flint.

" Glamorgan.

" Gloucester.

*City of Gloucester.*

*County of Hants.*

*City of Winchester.*

	LIST OF JURIS- DICTIONS.
<i>Town and County of the Town of</i> Southampton.	<i>Town and County of the Town of</i> Nottingham.
<i>County of Hereford.</i>	<i>County of Oxford.</i>
<i>City of Hereford.</i>	<i>City of Oxford.</i>
<i>County of Hertford.</i>	<i>County of Pembroke.</i>
„ Huntingdon.	<i>Town and County of the Town of</i> Haverfordwest.
„ Kent.	<i>County of Radnor.</i>
<i>City of Canterbury.</i>	„ Rutland.
<i>County of Lancaster.</i>	„ Salop.
„ Leicester.	„ Somerset.
<i>Parts of Holland in the County</i> of Lincoln.	<i>City of Bath.</i>
<i>Town of Boston.</i>	<i>City of Bristol and County of the</i> same City.
<i>Parts of Kesteven in the County</i> of Lincoln.	<i>City of Wells.</i>
<i>Borough and Soke of Grantham</i> with its limits.	<i>County of Stafford.</i>
<i>Parts of Lindsey in the County of</i> Lincoln.	<i>City of Lichfield.</i>
<i>City of Lincoln and County of the</i> same City.	<i>County of Suffolk.</i>
<i>City of London.</i>	„ Surrey.
<i>County of Merioneth.</i>	„ Sussex.
„ Middlesex.	<i>City of Chichester.</i>
<i>City and Liberties of West-</i> minster.	<i>County of Warwick.</i>
<i>County of Monmouth.</i>	<i>City of Coventry and County of</i> the same City.
„ Montgomery.	<i>County of Westmoreland.</i>
„ Norfolk.	„ Wilts.
<i>City of Norwich and County of</i> the same City.	<i>City of Salisbury.</i>
<i>County of Northampton.</i>	<i>County of Worcester.</i>
<i>City of Peterborough.</i>	<i>City of Worcester.</i>
<i>County of Northumberland.</i>	<i>East Riding of the County of</i> York.
<i>Town and County of the Town of</i> Newcastle-upon-Tyne.	<i>Town and County of the Town of</i> Kingston-upon-Hull.
<i>Borough and Town of Berwick-</i> upon-Tweed and County of the same.	<i>North Riding of the County of</i> York.
<i>County of Nottingham.</i>	<i>West Riding of the County of</i> York.
	<i>Liberty of Ripon.</i>
	<i>City of York and Ainsty of the</i> same City.

## APPENDIX No. II.

### THE LATE DOWER ACT.

ANNO TERTIO ET QUARTO GULIELMI IV. REGIS.

CAP. CV.

THE LATE  
DOWER ACT.

An Act for the Amendment of the Law relating to Dower.

[29th August, 1833.]

Meaning of the words in the act.      Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

"Land."

Number.

Widows to be entitled to dower out of equitable estates.

II. And be it further enacted, That when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land.

Seisin shall not be necessary to give title to dower.

III. And be it further enacted, That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

IV. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

THE LATE  
DOWER ACT.

No dower out of estates disposed of.

V. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Priority to partial estates, charges, and specialty debts.

VI. And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

Dower may be barred by a declaration in a deed.

VII. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Or by a declaration in the husband's will.

VIII. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Dower shall be subject to restrictions.

IX. And be it further enacted, That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Devise of real estate to the widow shall bar her dower.

X. And be it further enacted, That no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

Bequest of personal estate to the widow shall not bar her dower.

XI. Provided always, and be it further enacted, That nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

Agreement not to bar dower may be enforced.

XII. And be it further enacted, That nothing in this Act contained shall interfere with any rule of Equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Legacies in bar of dower still entitled to preference.

XIII. And be it further enacted, That no widow shall hereafter be entitled to dower ad ostium ecclesie, or dower ex assensu patris.

Certain dowers abolished.

THE LATE  
DOWER ACT.

Act not to take  
effect before the  
1st January, 1834.

XIV. And be it further enacted, That this Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.



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